10736

TRANSCRIPT OF RECORD.

Supreme Court of the United States.

OCTOBER TERM, 1907.

NO. 238.

WALTER M. McCAIN, ET AL.

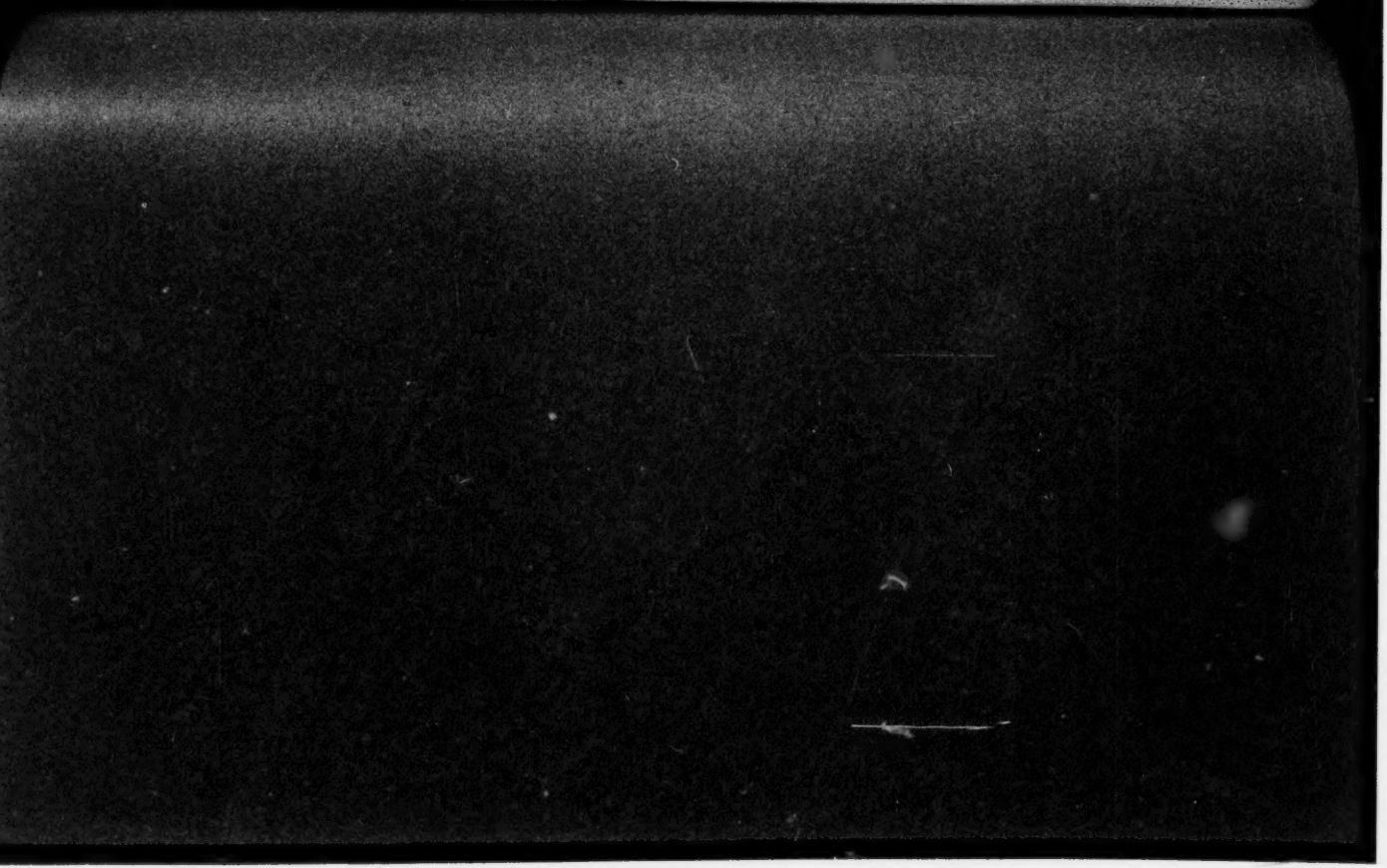
vs.

CITY OF DES MOINES, ET AL.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF IOWA.

FILED FEBRUARY 5, 1908.

(16,790)



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Pleas in the United States Circuit Court in and for the Southern District of Iowa in a certain cause wherein Walter M. McCain, *et al* were plaintiffs and the City of Des Moines, *et al* were defendants before the Honorable Oliver P. Shiras, District Judge assigned to the Southern District of Iowa, presiding at a term thereof begun and holden in the City of Des Moines, in said District, on the third Tuesday of November, it being the sixteenth day of November, A. D., 1897.

United States Circuit Court, Southern District of Iowa, Central Division.

BE IT REMEMBERED, that heretofore, to-wit:

On the 25th day of October, A. D., 1897, there was filed in the Clerk's office of the United States Circuit Court, Southern District of Iowa, Central Division thereof at Des Moines, in said District, a bill of Complaint by Walter M. McCain, Caroline M. Stewart, Edward R. Mason and the Independent School District of Greenwood Avenue against the City of Des Moines, George Sims and C. D. Boardman, constituting the Board of Public Works of the City of Des Moines, the Des Moines Brick Manufacturing Company and the Incorporated Town of Greenwood Park; that such proceedings were had in said cause under said bill as that afterward, to-wit: on the 10th day of December, 1897, there was issued out of said Clerk's office under the order of said Court a Temporary Restraining Order against the defendants and each of them, restraining them and each of them from doing certain things in said bill of complaint complained of; and such proceedings were had that afterward, to-wit: on the 4th day of January, A. D., 1898, the said cause came on to be heard before the said Circuit Court, the Honorable Oliver P. Shiras, United States District Judge, presiding, upon the complainants' motion for a Temporary Injunction against the defendants and each of them restraining them from doing certain things in said bill of complaint complained of and upon the demurrer of the said defendants and each of them to the said bill of complaint, and the said complainants, by leave of Court first had and obtained, filed an amended and substituted bill of complaint therein, which said amended and substituted bill of complaint was in words and figures following, to-wit:

1

Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

WALTER M. McCAIN, CAROLINE M. STEWART, EDWARD R. MASON, INDEPENDENT SCHOOL DISTRICT OF GREENWOOD AVENUE, Complainants,

vs.

THE CITY OF DES MOINES, GEORGE SIMS AND C. D. BOARDMAN, Constituting the Board of Public Works of the City of Des Moines, DES MOINES BRICK MANUFACTURING COMPANY and THE INCORPORATED TOWN OF GREENWOOD PARK, Defendants.

Amended and Substituted Bill in Equity.

To the Honorable Judges of said Court:

Your orators, Walter M. McCain, Caroline M. Stewart, Edward R. Mason and the Independent School District of Greenwood Avenue, by leave of Court duly entered of record, bring this their amended Bill of Complaint and make the same a substitute for their original Bill of Complaint against the City of Des Moines, George Sims and C. D. Boardman, Des Moines Brick Manufacturing Company and the Incorporated town of Greenwood Park, as defendants, and thereupon your orators complain and say:

That the City of Des Moines is, and at all times mentioned herein has been, a municipal corporation organized and existing under and by virtue of the laws of the State of Iowa as a city of the first class and situated in the County of Polk in said State; that the defendant George Sims and C. D. Boardman are the duly qualified and acting Board of Public Works of said City, with such power and authority as by the Statutes of said State are conferred on the Board of Public Works of a city of the first class;
2 that the Des Moines Brick Manufacturing Company is, and at all times mentioned herein has been, a corporation organized and existing for pecuniary profit under and by virtue of the laws of the State of Iowa; that the Incorporated Town of Greenwood Park is, and at all times mentioned herein has been, a municipal corporation duly organized as an incorporated town under and by virtue of the laws of the State of Iowa, situated in Polk County in said State. Said Incorporated Town of Greenwood Park lies adjacent to and bounds the aforesaid City of Des Moines on the western boundary line thereof.

And further complaining your orators say that they are, and at all times mentioned herein have been, residents and citizens of the aforesaid incorporated Town of Greenwood Park and owners in severalty of certain real estate therein located and described as follows, to-wit: that your orator Walter M. McCain, is the owner of the South East Quarter ($\frac{1}{4}$) of the South East Quarter of Section six (6), Township Seventy-eight (78) Range Twenty-four (24), except a strip off the North side thereof Five Hundred Three (503) feet wide and a strip off the West side of so much thereof as lies South of Ingersoll Avenue, Two Hundred Feet wide, and Ingersoll Avenue, which said real estate has a frontage of One Thousand, One Hundred Twenty (1,120) feet on West Grand Avenue and is, and at all times mentioned herein has been, of the real actual reasonable value of Twenty Thousand Dollars ($20,000). That your orator, Caroline M. Stewart, is the owner of the South Half ($\frac{1}{2}$) of the East One Hundred (100) feet of the West Five Hundred Ninety-one (591) feet of so much of the East Half of the South West

Quarter (¼) of Section Six (6), Township Seventy-Eight
3 (78), Range Twenty-four (24) as lies South of Ingersoll Avenue, which said real estate has a frontage of One Hundred (100) feet on West Grand Avenue and is, and at all times mentioned herein has been, of the actual and reasonable value of Twenty-five Hundred Dollars (2,500). That your orator, Edward R. Mason, is the owner of the West Six and one half (6½) acres of the North Ten (10) acres of the West Half (½) of the East Half (½) of the Northwest Quarter (¼) of Section Seven (7), Township Seventy-eight (78), Range Twenty-four (24), which said real estate has a frontage of Four Hundred Forty-one (441) feet on West Grand Avenue, and is, and at all times mentioned herein has been, of the actual value exceeding Fifteen Thousand Dollars ($15,000). That your orator, The Independent School District of Greenwood Avenue is, and at all times mentioned herein has been a municipal corporation organized and existing under and by virtue of the laws of the State of Iowa and a citizen of said State and that your orator has a certain tract of land in said incorporated Town of Greenwood Park and situated in the Southwest Quarter (¼) of Section Six (6), Township Seventy-eight (78), Range Twenty-four (24) West of the Fifth P. M., which said real estate has a frontage on West Grand Avenue of Eighty-two and One-half (82½) feet, and is, and at all times mentioned herein has been, of the actual value of Eight Thousand Dollars ($8,000.00).

And further complaining your orators state that this is a controversy and suit of civil nature arising under the laws of and the Constitution of the United States, and that the matter and amount in dispute, to-wit: the jurisdiction and power of the City of Des Moines to exercise the functions of government and taxation over the property of your orators, as hereinafter more
4 fully shown, exceeds in value and amount exclusive of interest and costs as to each of your orators the sum of Two Thousand Dollars.

Your orators further state: that on, and for many years prior to March 3d, 1890, the general laws and statutes of the State of Iowa prescribed the manner and the regular and orderly course of procedure by which municipal corporations of the class and character of the said incorporated Town of Greenwood Park and of the said City of Des Moines, could be annexed and consolidated into a single municipal corporation, said laws being uniform in their effect and operation, and giving to each municipal corporation so desiring to be consolidated or annexed, powers and rights to negotiate the terms and conditions of such annexation, and requiring that the electors of each of said municipal corporations should, by a majority vote, favor such annexation before the same shall become operative and effectual and binding; that said general laws and

statutes, as aforesaid, are still in force and unrepealed and unmodified, and of the same effect as on and prior to the said 3d day of March, A. D., 1890; that the Constitution of the State of Iowa on and prior to the aforesaid date, provided, and still provides, as follows:

"All laws of a general nature shall have a uniform "operation. The general assembly shall not grant "to any citizen or class of citizens privileges or im- "munities which, upon the same terms, shall not "equally belong to all citizens.

"The legislature shall not pass local or special "laws in the following cases: for the assessment "and collection of tax for State, County or road "purposes; for laying out, opening and working "roads or highways; for changing the names of per- "sons; for the incorporation of cities and towns; "for vacating roads, town plats, streets, alleys or "public squares; for locating or changing County "Seats. In all the cases above enumerated, and in "all other cases where a general law can be made "applicable, all laws shall be general, and of uniform "operation throughout the State."

That by a certain Act of the 23d General Assembly of the State of Iowa approved March 3d, A. D., 1890, being an Act entitled, "an Act to extend the limits of cities and for other purposes incident thereto," it is and was provided that the boundaries of all cities in the State of Iowa which had, by the State census of 1885, a population of 30,000 or more are hereby extended two and one half miles in each direction from the present boundaries of said cities, such extension being so made as to leave the boundaries thereby created in a perfect rectangle. That the territory embraced within said extended boundaries, whether the same is contained in cities, incorporated towns or otherwise, shall be and become a part of the city and subject to its jurisdiction and authority; and the corporate character of any annexed territory within the extended boundaries hereby specified shall cease and determine.

Your orators show that the City of Des Moines was the only city of the State of Iowa to which the aforesaid Act was applicable in that it was the only city of said State which, by the State Census of 1885, had a population of 30,000 or more; that the purpose, effect and result of said Act, if the same was valid and operative, was to dissolve and destroy the incorporated Town of Greenwood Park, and to annex and incorporate to the City of Des Moines, all of the territory contained in said incorporated Town of Greenwood Park including

the lands and properties hereinbefore described and belonging to your orators, as hereinbefore set forth. That the effect of said Act, if valid and operative, was and would be to give the City of Des Moines authority and jurisdiction over all of said territory of the incorporated Town of Greenwood Park including the lands of your orators for purpose of taxation and for the purpose of establishing, opening, vacating, changing and improving streets and of making special assessments for defraying and meeting the expenses of paving, grading, sidewalks, curbing and
6 sewering within said territory and in all respects to exercise the functions of government and taxation thereover and to levy against your orators for and on account thereof assessments to meet the expenses of such improvements within said territory, and also general taxes to meet the current expenses of government of the city of Des Moines, including the payments of interest on debts previously contracted by such city and the payments of said principal indebtedness as the same shall mature and accrue

And your orators further show that the aforesaid Act of the 23d General Assembly was and is unconstitutional and void and repugnant to the Constitution of the State of Iowa and unto the Constitution of the United States in this that it is a local, special law for the incorporation of cities and amending and controlling the previous laws and ordinances incorporating the said city of Des Moines.

That it creates in effect a corporation by the enactment of special laws. That it is a law that did not have uniform operation and undertook to grant to the citizens of the municipal corporation of the city of Des Moines as the same existed on and prior to the 3d day of March, 1890, privileges and immunities, which upon the same terms are not granted to all of the citizens of the State of Iowa or to your orators, and that said Act has been by the Supreme Court of the State of Iowa adjudged to be unconstitutional and void.

That the defendant, the incorporated Town of Greenwood Park, has never been dissolved and is entitled to exercise all the functions of government and taxation ordinarily appertaining to such incorporated towns over its territory as the same existed prior to said 3d day of March, A. D., 1890; but that in compliance with and in pursuance of said pretended and void Act of said
7 23d General Assembly, the said incorporated Town of Greenwood Park has ceased to exercise the aforesaid functions and rights of government, regulation and taxation over the said territory and over the aforesaid property of your orators; and that notwithstanding the aforesaid Act of the 23d General Assembly is wholly void and of no effect, the defendant City of Des Moines, and the Defendants, the Board of Public Works of the

City of Des Moines, are pretending and undertaking to exercise the aforesaid functions of government authority and general taxation over the said territory of Greenwood Park and over the said lands and properties of your orators hereinbefore described. And are also pretending and undertaking to enter upon the territory of the incorporated Town of Greenwood Park and to make and cause to be made such improvements in the way of grading, paving, sidewalks, guttering, curbing and sewering as the said city, by and through its Council and Board of Public Works, shall elect and direct under and in pursuance of statutes applicable to the said City of Des Moines. But your orators show that all of the aforesaid acts of the City of Des Moines asserting rights of government, or taxation, or jurisdiction for purposes of special improvements are without rightful authority, are unconstitutional and void and contrary to the aforesaid statutes and provisions of the State of Iowa.

That the sole and only reason and warrant for the incorporated Town of Greenwood Park yielding and submitting to the acts of the City of Des Moines in exercising the functions of municipal government and taxation over the territory of the said incorporated Town of Greenwood Park was through and on account of the supposed force of the aforesaid void and unconstitutional Act of said 23d General Assembly. That the sole and
8 only warrant and authority under and by virtue of which said City of Des Moines originally exercised and now exercises over the said incorporated Town of Greenwood Park, said functions of municipal government and taxation were under and by virtue and by color of authority of the aforesald unconstitutional and void Act of the said 23rd General Assembly of the State of Iowa. That the complainants have none of them acquiesced in or submitted or agreed to the aforesaid acts of Greenwod Park in yielding its municipal functions to the City of Des Moines or to the acts of said city in assuming and undertaking to exercise functions of municipal government and taxation over the said territory of Greenwood Park to the property of complainants, but that on the contrary, complainants at that time protested and resisted in every peaceful and orderly manner the aforesaid acts of said municipal corporation.

And further complaining your orators state: that the citizens of Greenwood Park have never in any manner assented or acqueisced in or agreed to said acts of the City of Des Moines, but that the same have been and still are exercised over the citizens and property of Greenwood Park without their consent and without in any manner permitting the citizens of Greenwood Park by orderly election or otherwise to determine whether said pretended acts of annexation should be operative or not.

And further complaining your orators state: that the aforesaid enactment of the 23rd General Assembly of the State of Iowa and the acts of defendants under color of authority thereof are contrary to and in violation of Section One, Article 14 of the Constitution of the United States in that such acts deprive your orators of their property without due process of law and deny to
9 your orators the equal protection and operation of the law, and further that said acts are contrary to and in violation of Article 5 of the Constitution of the United States in that thereby the property of your orators is taken for public use without just compensation.

And further complaining your orators state: that the City of Des Moines, through its Board of Public Works and council, and on the 9th day of September, A. D , 1893, undertook and pretended to enter into a contract with the defendant Des Moines Brick Manufacturing Company to lay a pavement upon a public highway extending across and through the said Town of Greenwood Park for a distance of one mile at an expense approximating $50,000.00 the cost of which was to be assessed upon the property of your orators and other citizens and property owners of the said Town of Greenwood Park, residing along and abutting upon said highway which was commonly known as Grand Avenue. The said contract was entered into by the City of Des Moines, as aforesaid, under color of authority of the said Act of the 23rd General Assembly of the State of Iowa, and that the said contract was and is wholly void in that the said Annexation Act was unconstitutional and that the City of Des Moines acquired thereby no power, authority or right to contract with reference to said highway within the limits of said incorporated Town of Greenwood Park. That thereafter and on or about the 20th day of September, A. D., 1897, the defendant Des Moines Brick Manufacturing Co. against the express objection and protest of your orators undertook and pretended to enter upon the work of constructing said pavement and under and by virtue of said pretended contract with the City of Des Moines.

And further complaining your orators say: that the Board
10 of Public Works and the said City of Des Moines will, when said pavement is completed, proceed to levy a tax upon the property of your orators and others owning property abutting upon said street and pavement for the cost thereof, as provided in said pretended contract between said Brick Manufacturing Company and the said City of Des Moines which tax will become a cloud and ostensible lien upon the property of your orators and of others owning property on said street, and will be to your orators and others an irreparable injury.

And further complaining your orators state: that at the time of the pretended extension of the city limits and jurisdiction of the

City of Des Moines over the said Town of Greenwood Park, the said Town of Greenwood Park was exclusively an agricultural community and that there was no advantage or necessity whatever for the annexation of said Town of Greenwood Park to the City of Des Moines.

That the said Town of Greenwood Park had at the time of the passage of said act of March 3rd 1890, an area of one mile east and west and about one and one-half (1½) miles north and south. That there were at that time but two or three highways within the whole territory. One street or highway running from the eastern to the western border thereof which was popularly known as Greenwood Avenue, and one public highway upon the eastern border thereof known as Western Avenue, it being upon the western boundary of said City of Des Moines One public highway running through the town from the north to the south about the center thereof and one public highway on the western boundary thereof. That none of the property within said territory had been platted into lots by laying out of streets and alleys, and that the streets above mentioned had been, prior to the incor-
11 poration of said Town of Greenwood Park, public roads or highways that had been made such by the acts of the proper officers of Polk County, Iowa, and which were prior to the incorporation of the Town of Greenwood Park, under the jurisdiction of officers of Polk County.

And further complaining your orators say: that on the 3rd day of March, 1890, and at the time the said City of Des Moines entered upon and commenced to usurp municipal functions of government and taxation over the said Town of Greenwood Park, the said Town of Greenwood Park was wholly free from municipal indebtedness of every kind and character whatever; that the the said City of Des Moines has incurred no indebtedness whatever on account of or for the benefit of Greenwood Park. That on the 3rd day of March, 1890, and at all times since, the said City of Des Moines was and now is indebted on account of outstanding obligations in a sum exceeding One Million Dollars ($1,000,000.00), which said indebtedness is the full limit which the said City of Des Moines is authorized to contract as a municipal corporation.

And further complaining your orators say: that not withstanding the provisions contained in Section Two of said Act of the 23rd General Assembly of the State of Iowa entitled, "An Act to extend the limits of cities and for other purposes incident thereto," which undertook to exempt the territory of Greenwood Park from taxation on account of existing indebtedness of the said City of Des Moines, the said 23rd General Assembly thereafter and on the 25th day of March, 1890, passed another Act applicable to said City of Des Moines and entitled, "An Act to authorize certain

cities of the first class to issue bond and to provide for the payment of principal and interest," which said Act was duly approved by the Governor of the State of Iowa and is operative and in effect as applied to cities of the first class, and which said Act
12 modifies and amends the former Act of March 3rd, 1890, so that the said City of Des Moines was authorized to and has refunded its entire debt, as aforesaid, as of a date subsequent to the pretended annexation of Greenwood Park to the City of Des Moines. And under color of authority of the aforesaid statutes, the said City of Des Moines threatens to levy taxes and has heretofore levied taxes upon the property of your orators and others situated in the said Town of Greenwood Park for the payment of the said indebtedness of the said City of Des Moines which accrued and existed prior to the said 3rd day of March, 1890, all of which acts of the City of Des Moines under color of authority of said statutes of the State of Iowa are contrary to the Constitution of the United States and to Section 1 of Article 14 thereof in that it deprives your orators of their property without due process of laws and denies to your orators the equal protection and operation of the law; and also contrary to Article 5 of the Amendment to the Constitution of the United States in that the property of your orators is taken without compensation.

Further complaining your orators say: that at no time since the third day of March, 1890, up to and including the present time, has the City of Des Moines expended upon the streets and alleys or highways or upon any other work of internal improvement within the said Town of Greenwood Park any sum of money, except possibly the nominal sum of not to exceed $500.00, which has been expended for smoothing the surface of the streets within said territory. That no money has been expended by the said City of Des Moines for police protection within said territory nor for any other purpose except for lighting the said streets, and that such expenditure for lighting has not exceeded $400.00 per year. That at and prior to the
13 third day of March, 1890, there was in the hands of the treasurer of the said Town of Greenwood Park and in the hands of the treasurer of the County of Polk in the State of Iowa, who was by law of said State of Iowa the collector of taxes for the said Town of Greenwood Park, a large sum of money, to-wit: The sum of approximately $1,000, all of which money was, under the provision of said Act paid over to the treasury of the City of Des Moines by the said Treasurer of the said Town of Greenwood Park and the said County Treasurer. And the said City of Des Moines took possession of the personal property of the said Town of Greenwood Park consisting of a road grader and other tools and implements

used for making the streets in the said Town of Greenwood Park and removed the same from the said Town of Greenwood Park, appropriating the same to the use of the said City of Des Moines in other parts of said city than that of the Town of Greenwood Park, all of which acts were done under the authority of the said act above referred to.

And further complaining your orators say: that since the approval of said Annexation Act of March 3d, 1890, up to and included in the present year, the said City of Des Moines has levied upon the territory and property of said incorporated Town of Greenwood Park, including the property of your orators, for the general fund of the City of Des Moines a sum exceeding Twenty-five Hundred Dollars ($2500) per annum, and that the only return to the said Town of Greenwood Park for the money and property received as aforesaid, has been an expenditure of about Four Hundred Dollars ($400.00) per year for lighting said Town and a total expenditure as aforesaid of about Five Hundred Dollars ($500.00) since said 3d day of March, 1890, on the streets of said incorporated Town of Greenwood Park.

14 And further complaining your orators say: That the said City of Des Moines has caused to be expended, in the nature of improvements a sum not exceeding Thirty-eight Hundred Dollars ($3800.00) for curbing along Grand Avenue in Greenwood Park since the said 3rd day of March, A. D., 1890, and a sum not exceeding Nine Thousand Dollars ($9,000.00) for sewer within said territory, and that the aforesaid are the sole and only improvements therein made by the City of Des Moines. That the cost of the aforesaid improvements has been levied upon the property of Greenwood Park benefitted thereby, and that the owners of the property against which the special levies have been made, have voluntarily paid therefor, except the sum of about Twelve Hundred Dollars ($1200 00) still remaining due on said curbing and except the sum of about Twenty-five Hundred Dollars ($2500 00) still remaining due on said sewering and that as to the amounts still remaining due as aforesaid, the owners of property, against whom the same have been assessed, have voluntarily waived all objections to said assessments and have voluntarily accepted said improvents for and on account of said property and have agreed to pay therefor.

And further complaining your orators state: that by reason of the facts herein set out the City of Des Moines has suffered and would suffer no prejudice by a judgment and decree herein, re-establishing the incorporated Town of Greenwood Park, and enjoining said City of Des Moines from exercising further municipal jurisdiction and authority over the territory of the said incorporated Town of Greenwood Park. That on the contrary,

the said incorporated Town of Greenwood Park and your orators and all other citizens and property owners therein have suffered and will continue to suffer great prejudice and wrong, by reason of an exercise by the City of Des Moines of the aforesaid function of municipal government and taxation, which said functions
15 have been exercised in the past and will be in the future oppressively as against the citizens of Greenwood Park and in the interest of the said original City of Des Moines as it existed prior to the said Act of March 3, 1890, and that the City of Des Moines ought to account to the said incorporated Town of Greenwood Park for all money received by said City of Des Moines from the territory within said Town of Greenwood Park in the way of general taxation in excess of the money expended by the City of Des Moines in said territory and for the benefit of said territory for fire and police protection and for lighting and for other purposes, as hereinbefore stated and for all property and money received from the officers of Greenwood Park and Polk County.

And further complaining your orators state: that they bring this bill and beg leave to prosecute the same for and on behalf of themselves and for and on behalf of the said incorporated Town of Greenwood Park and of all citizens, residents and owners of property therein situated in like condition as your orators and who may hereafter join themselves as complainants herein and pray the benefit of the decree of this court herein.

Inasmuch as your orators are wholly remediless at law, your orators pray that the defendants, the City of Des Moines and the Board of Public Works thereof, all officers, agents and employees of said City be perpetually enjoined from exercising over the territory of the incorporated Town of Greenwood Park any function of municipal government or authority or jurisdiction for the purpose of taxation or for works of internal improvement therein.

That said defendants be enjoined from levying or undertaking to levy any taxes special or general, upon the property of
16 your orators in said territory of the incorporated Town of Greenwood Park, and the said defendant, City of Des Moines, be enjoined from levying any taxes on account of interest or principal of the aforesaid indebtedness of said city which existed on the 3d day of March, A. D., 1890, and that the said defendants be enjoined from interfering with the officers of said incorporated town of Greenwood Park or obstructing said officers in the administration of the municipal affairs of said town.

That the said incorporated Town of Greenwood Park be authorized and enjoined to exercise for its own future benefits under the Statutes of the State of Iowa, all functions of municipal government, taxation and works of internal improvement in the same

manner and to the same extent as the said functions have been exercised by said defendant prior to the 3d day of March, 1890.

That the defendants, the City of Des Moines, George Sims and C. D. Boardman, constituting the Board of Public Works, be perpetually enjoined from making any levy on the property of your orators, or on the property abutting upon said Grand Avenue in Greenwood Park, for or on account of the paving by the defendant, the Des Moines Brick Manufacturing Company.

And that the said defendant be perpetually enjoined from issuing to said Des Moines Brick Manufacturing Company any assessment certificates on account of said paving.

That the said defendant, the incorporated Town of Greenwood Park, be authorized and empowered to prosecute against the
17 said City of Des Moines, its ancillary bill for and on account of the matters set forth in this your orators' Bill of Complaint and such other relief as equity and good conscience may require.

May it please your Honors to grant unto your orators a writ of subpœna running unto the said defendants and each of them, and demanding them at a time certain therein named, to appear and answer herein, but not under oath (answer under oath being expressly waived) your orators Bill of Complaint herein.

(Signed) WISHARD & CLARK,
Solicitors for Complainant.

(Signed) WM. G. CLARK,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of Iowa,
Polk County. } ss.

I, Edward R. Mason, being first duly sworn on oath depose and say that I am one of the Complainants herein, that I have read the foregoing bill of complaint and know the contents thereof, that the statements therein contained are true, except those matters therein stated on information and belief, and those I believe to be true.

[Signed] EDWARD R. MASON.

[SEAL] Subscribed in my presence and sworn to before me by the said Edward R. Mason, this 7th day of January, A. D., 1898.

[Signed] MAZE VERNON,
Notary Public in and for Polk County, Iowa.

(Endorsed:) No. 2355 Eq. U. S. Circuit Court, Southern District of Iowa, Cent. Division. W. M. McCain, *et al. vs.* City of Des Moines, *et al.* Amended and Substituted Bill. Filed by leave of Court, January 11, 1898. E. R. Mason, Clerk.

And said cause was submitted to the said Court upon the amended and submitted bill of complaint, as above set forth, and upon the defendants' demurrer, thereto or so much of defendants' demurrer as demurred to the jurisdiction of the Court, and upon the application of the complainants for a Temporary Injunction against the said defendants restraining them from doing the things therein complained of, and which said demurrer is in words and figures following, to-wit:

In the Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

WALTER M. McCAIN, *et al.*
vs.
CITY OF DES MOINES, *et al.*
} No. 2355, Equity.

Demurrer of the Defendant the Des Moines Brick Manufacturing Co. to Amended and Substituted Bill.

The defendant The Des Moines Brick Manufacturing Company by protestation not confessing all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill and for cause of demurrer doth say:

First. That the said complainants have not by their said bill made such a case as entitles them in a court of equity to any relief against this defendant as to the matters contained in the said bill or any such matters.

Second. That the said bill is multifarious in that it sets up various separate and distinct alleged causes of action
19 against the City of Des Moines, its officers, agents and employes, to prevent them from further exercising the jurisdiction of the City of Des Moines as a municipal corporation over the territory formerly embraced within the limits of the incorporated Town of Greenwood Park, and also an alleged cause of action in favor of each of the complainants against the defendant the Des Moines Brick Manufacturing Company and the City of Des Moines and its officers, founded upon the claim that the paving contract referred to in complainants' bill is invalid and has not been faithfully performed, and that therefore each of the complainants is entitled to an injunction against the levying of any assessment on account of such paving against his property abutting thereon.

Third. Because it appears upon the face of the complainants' said bill that all of the parties to this suit are citizens of the State of Iowa, and that this suit does not involve any question arising under the Constitution or laws of the United States conferring jurisdiction upon this Court.

An for further and more specific grounds of demurrer this defendant avers as follows, to-wit:

Fourth. If or in so far as the said bill of complaint is to be treated and regarded as a bill to enjoin the defendant the City of Des Moines, its officers, agents and employes from exercising over the territory formerly embraced in the incorporated Town of Greenwood Park the functions of municipal government, then it clearly appears that this Court has no jurisdiction to hear or determine the said matters, but that the sole and exclusive remedy is an action at law and by an action prosecuted in the name of the state, and that the same cannot be heard or determined at the suit of a private party.

Fifth. If or in so far as the said bill of complaint is to be treated and regarded as a bill to enjoin the defendants from levying a tax, special or general, upon property within the territory formerly embraced in the incorporated Town of Greenwood Park and from interfering with the officers of the said town or obstructing the same in the administration of its municipal affairs, then it clearly appears that this Court has no jurisdiction to hear or determine the said matters, but that the sole and exclusive remedy is an action at law and by an action prosecuted in the name of the state, and that the same cannot be heard or determined at the suit of a private party.

Sixth. If or in so far as the said bill of complaint is to be treated and regarded as a bill to authorize and enjoin the said incorporated Town of Greenwood Park to exercise the functions of municipal government to the same extent as they were exercised by it prior to the 3rd of March, 1890, then it clearly appears that this court has no jurisdiction to hear or determine the said matters, but that the sole and exclusive remedy is an action at law and by an action prosecuted in the name of the State, and that the same cannot be heard or determined at the suit of a private party.

Seventh. If or in so far as the said bill of complaint is to be treated and regarded as a bill for a decree to authorize and empower the said incorporated Town of Greenwood Park to prosecute against the defendant the City of Des Moines its ancillary bill on account of the matters set forth in the complainants' bill of complaint in this cause, then it clearly appears that this court
21 has no jurisdiction to hear or determine the said matters, but that the sole and exclusive remedy is an action at law and by an action prosecuted in the name of the state, and that the same cannot be heard or determined at the suit of a private party.

Eighth. If or in so far as the said bill of complaint is to be treated and regarded as a bill to enjoin the City of Des Moines and the Board of Public Works of said City from levying an assessment against the property of complainants on account of the

work of paving described in said bill, for that the said controversy is one solely between citizens of the same state and does not involve any question arising under the Constitution or the laws of the United States sufficient to confer jurisdiction upon this court in the absence of diverse citizenship, and for that under the statutes of the State of Iowa in such cases made and provided a remedy is accorded to the complainants for the correction of any wrongs arising out of any errors or irregularities in connection with the making of the said assessment, while the complainants' bill does not aver that the complainants will be or have been deprived of these remedies, or that they have been exhausted, or that they will not be entirely adequate

WHEREFORE this defendant prays the judgment of the Court whether it shall be compelled to further answer said bill, and further prays to be dismissed with its costs.

[Signed.] N. T. GUERNSEY,
Solicitor for Des Moines Brick Manufacturing Co., Defendant.

I, N. T. Guernsey, of Counsel for the Des Moines Brick Manufacturing Company, defendant in the above entitled cause,
22 do hereby certify that the foregoing demurrer to the bill of complaint is in my opinion well founded in law.

[Signed.] N. T. GUERNSEY.

United States of America, } ss:
Southern District of Iowa. }

I, Martin Flynn, being duly sworn on oath depose and say that I am the president of the Des Moines Brick Manufacturing Company, defendant in the above entitled cause. I further state that the demurrer to the bill of complaint is not interposed for the purpose of delay.

[Signed.] MARTIN FLYNN.

[SEAL] Sworn to before me and subscribed in my presence by the said Martin Flynn on this 11th day of January, A. D., 1898.

[Signed] GEO. R. SANDERSON,
Notary Public in and for Polk County, Iowa.

(Endorsed on cover:) No. 2355, Equity. U. S. Cir. Court, Southern Dist. of Iowa. Walter M. McCain vs. City of Des Moines, et al. Demurrer to Amended and Substituted Bill. Filed January 11th, 1898. Ed. R. Mason, Clerk. N. T. Guernsey, Atty. for Defendants.

And the Court after having duly considered the same and being sufficiently advised in the premises filed in said cause its written opinion holding that the Court could not take jurisdiction of the case and for that reason denied the complainants' motion for a Temporary Injunction, set aside the restraining order theretofore entered in said cause and sustained the defendants' demurrer to

the said bill of complaint as to *the third* division thereof, which sets up and demurs to the complainants' bill of complaint because there was no jurisdiction in said Court to try said cause,
23 which said written opinion is in words and figures following, to-wit:

In United States Circuit Court in and for the Southern District of Iowa, Central Division.

WALTER M. McCAIN, ET AL
vs.
THE CITY OF DES MOINES, ET AL. } Equity.

Submitted on motion for issuance of preliminary Writ of Injunction and demurrer to amended bill.

WISHARD & CLARK,
For Complainants.
N. T. GUERNSEY,
For Defendants.

SHIRAS, *District Judge.*

In the year 1890 the General Assembly of the State of Iowa passed an Act entitled, "An Act to extend the limits of cities and for other purposes incidental thereto," which by its terms was limited to cities which by the census of 1885 were shown to have a population of 30,000 or more. Acting under the provision of this Act the City of Des Moines exercised corporate jurisdiction over the territory which had formerly been included within the limits of the incorporated Town of Greenwood Park, and the Board of Public Works of the City entered into contracts with third parties for the paving of streets extending through the Town of Greenwood and the City also refunded its public debt by the issuance of bonds under the provisions of an act of the State Legislature approved March 25th, 1890. In March, 1894, there was brought in the District Court of Polk County, Iowa, a proceeding by quo warranto in the name of the State of Iowa ex rel A. G. West against the City of Des Moines, in which it was claimed that the Act of the General Assembly extending
24 the City limits was in its nature special legislation and therefore void under the provisions of the State Constitution which forbids the enactment of special laws for the incorporation of towns and cities and a judgment of ouster was prayed against the City of Des Moines for the purpose of preventing it from further exercising governmental authority over the territory added to the City under the Act of March, 1890. The case was carried to the Supreme Court of the State, wherein it was held that the legislative Act was clearly unconstitutional, because its terms were such that it could only apply to the City of Des Moines and it was therefore in effect the same as though that city had been named in the Act as the corporation intended to be affected thereby and hence the Act was special in its nature and

therefore within the constitutional inhibition. The Court further held, however, that the delay in instituting proceedings, coupled with the fact that many and large interests had become involved and would be affected by a judgment of ouster, constituted ground for estopping the attack upon the legality of the extension of the city limits and the decree of ouster was refused. State ex rel West v. City of Des Moines, 65 N. W. Rep., 818.

In October, 1897, the present proceedings were commenced by the complainants who are residents and property owners within the territory formerly constituting the Town of Greenwood and now within the limits of the City of Des Moines as defined in the Act of the Legislature, the defendants named in the bill being the City of Des Moines, the members of the Board of Public Works of the city, the Des Moines Brick Manufacturing Company and the Incorporated Town of Greenwood Park.

25 The bill recites the facts upon which it is claimed that the legislative Act is unconstitutional, avers that the former authorities of the Town of Greenwood Park have ceased to act; that the City of Des Moines is exercising jurisdiction over the territory of Greenwood Park and through its Board of Public Works has contracted for a large amount of paving to be done in the streets extending through the added territory; that for the cost thereof the city will assess and levy heavy taxes upon the property of complainants; that the city will continue to exercise municipal authority over such territory and will subject the property and the property owners therein to heavy taxes to pay the refunded city debt; that thereby the property of complainants will be taken without due process of law and in violation of the Federal Constitution, wherefore it is prayed that this Court will perpetually enjoin the City of Des Moines and its Board of Public Works from exercising over the territory of Greenwood Park any function of municipal government, or authority or jurisdiction for the purpose of taxation or for the work of internal improvement therein, or from levying any taxes special or general upon the property within said town or from interfering with the officers of said incorporated Town of Greenwood Park in the administration of its municipal affairs; that the incorporated Town of Greenwood Park be authorized and enjoined to exercise for its own future benefits and functions of municipal government, taxation and the carrying on of works of internal improvement included and said Town be authorized to prosecute its ancillary bill against the City of Des Moines for settlement of the matters averred in the bill.

26 The bill on its face shows that the several parties named as complainants and defendants are all citizens of Iowa or corporations created under the laws of that State and hence jurisdiction in this Court cannol be assumed on the ground

of diverse citizenship. In support of the Federal jurisdiction it is averred in the bill that the controversy is one arising under the laws and constitution of the United States; that the Acts of the City are such that they deprive complainants of their property without due process of law and deny them the equal protection of law and take the property of complainants without due compensation, all of which is alleged to be in contravention of the Federal Constitution. The averments to the effect that the controversy is one arising under the Federal Constitution or laws, or that the parties are denied due process of law and the like are merely conclusions of law, and the court must look to the facts averred in the bill to see whether they support the conclusions sought to be based thereon, for unless the facts averred show a ground of jurisdiction, it will not be infered from mere averments of legal conclusions.

Do the facts averred show that the controversy between the parties is based upon any provision of the Federal Constitution or laws, so that it can be said that the case is one arising under the same.

The real gist of the controversy is the question whether the corporate limits of the City of Des Moines have been in fact extended over the territory formerly constituting the Town of Greenwood Park, so that the city, through the proper authorities, can lawfully control the extension and paving of the streets in that territory and impose taxes on the property therein for that and other municipal purposes. If the City of Des Moines has acquired the right to exercise municipal control for the purposes named
27 over the territory in question, then it is clear that the complainants are not entitled to a decree forbidding the City of Des Moines from continuing to exercise this control over such territory, nor are they entitled to a mandatory injunction compelling the former corporation of Greenwood Park to re-assume the exercise of corporate power over such terrritory, nor do they show themselves entitled to a decree forbidding the City of Des Moines from levying taxes on their property to meet corporate expenses. The pivotal point, therefore, in the controversy is this question whether the city of Des Moines can lawfully exercise its municipal authority over the territory of Greenwood Park as being part of the City of Des Moines. There is no provision of the Federal Constitution or laws which will be involved in the solution of this question. The determination thereof depends wholly upon the construction of the State Constitution and laws and it is a question upon which the decision of the Supreme Court of the State is absolutely binding upon this court. The powers that may be lawfully exercised by the City and the extent of the territory over which such powers may be exercised are questions depending upon

the laws of the State of Iowa, under which the corporation was originally created and which authorized the extension of the city limits as need therefore may arise, and thus it appears that the case is not based upon any right created or immunity guaranteed by the Federal Constitution or laws. Thus in *Starin vs. New York*, 115 U. S., 248, it is said: "The character of a case is deter-
" mined by the questions involved. *Osborn vs. Bank of the United*
" *States*, 9 Wheat, 637,824. If from the questions it
28 " appears that some title, right, privilege or immunity, on
" which the recovery depends, will be defeated by one
" construction of the Constitution or a law of the United States,
" or sustained by the opposite construction, the case will be one
" arising under the constitution or the laws of the United States,
" within the meaning of that term as used in the act of 1875;
" otherwise not." The question involved in that case was whether the City of New York had, under its charter, the exclusive right to establish ferries between Manhattan Island and the shores of Staten Island. The Supreme Court held that this question depended upon the construction of the Charter and that it did not involve a Federal question and hence the United States Circuit Court court could not take jurisdiction thereof.

In *Shreveport vs. Cole*, 129 U. S., 36, it was held that, "Unless
"this suit was one arising under the Constitution or laws of the
"United States, the Circuit Court had no jurisdiction, and if it
"did not really and substantially involve a dispute or controversy
"as to the effect or construction of the Constitution or some law,
"upon the determination of which the recovery depended, then it
"was not a suit so arising." Applying this test to the present case, what is the result? There can be no question that the complainants herein could have brought the suit in the State Court had they chosen that forum, can there be any question that they could have presented every ground they rely upon as a foundation for the claim that the asserted extension of the corporate limits and corporate powers of the City of Des Moines over their property is illegal and therefore invalid, without quoting any section or clause of the Federal Constitution or laws? Is it not clear that whatever Court undertakes to pass upon the rights sought to be enforced in this case must solve the problems by a construction of the State Constitution and laws, and that in determining the pivotal question whether the property formerly included within the Town of Greenwood Park is now within the limits and subject to the control of the City of Des Moines, no clause or provision of the Federal Constitution or laws will be referred to or be brought up for consideration. It must then be held that this case is not one wherein the rights of the complainants to ask a decree restraining the City of Des Moines from continuing to exercise

corporate authority over the territory in question is based upon any provision of the Federal Constitution or laws and as the right of recovery or to the relief sought would not be affirmed by one construction or denied by another construction of the Federal laws, it cannot be rightfully said that the controversy is one arising under the Federal Constitution or laws and jurisdiction in this Court cannot be maintained on that ground.

Equally unavailing are the general averments that unless restrained, the City of Des Moines will continue to exercise its corporate authority over the property of complainants; will continue the work of improving the streets in the territory of Greenwood Park and will levy taxes on the property therein for the payment of street improvements and of the City debt, and that thereby the property of complainants will be subjected to burdens without due process of law and be taken without compensation It is open to complainants to attack the validity of the asserted extension of the City limits in the State Courts. unless that question is settled by the decision of the Supreme Court of Iowa in the case already cited. There is no provision in the laws of Iowa which preclude the complainants from obtaining a hearing upon all the questions which are presented by the bill filed in this suit. Of a case brought for that purpose the State Court would have jurisdiction. If in the progress thereof the complainants should seek to rely upon any right or immunity granted by the Federal Constitution or laws, the State Court could give them the full benefit thereof, or if such benefit was refused. the parties could carry the question before the Supreme Court of the United States and obtain protection therefrom. Thus in *New Orleans vs. Benjamin*, 153 U. S, 411, a case which in some of its features is similar to the one now under consideration, it was held that the Circuit Court had not jurisdiction, it being therein said that "Ordinarily the question of the repugnancy a State Statute to the "impairment clause of the Constitution is to be passed upon by the "State Courts in the first instance, the presumption being in all cases "that they will do what the Constitution and laws of the United "States require, *Chicago & Alton R. R. Co vs. Wiggins Ferry Co.*, "108 U. S. 18; and if there be ground for complaint of their "decision, the remedy is by writ of error under Section 709 of the Revised Statutes." It is not claimed or averred in this bill, nor could it be so claimed rightfully, that under the Constitution and laws of Iowa, a party can be deprived of his property without giving him his day in Court, or that property can be taken for a public use without due compensation, or that provision is not made enabling every one whose property is assessed and taxed, to question the validity of the tax. When traced to its real foundation, the claim asserted by complainants, that without due process of

law, their property is being burdened with assessments is based upon the theory that the laws of Iowa do not afford them ample means for testing the validity of the assessments made, but it is based upon the claim that their property is not within the limits of the City of Des Moines, is not therefore subject to the control of the City authorities and cannot be lawfully assessed or taxed by them. It is manifest, however, that the legality or illegality of the action of the City is dependent upon the question whether the territory of Greenwood Park now forms part of the City of Des Moines, and the existence of this disputed question does not show that the complainants are in any proper sense denied due process of law for the protection of their rights or that they are denied the equal protection of the laws within the meaning of the Federal Constitution.

As the lack of jurisdiction in this Court is thus apparent on the face of the bill, it follows that the motion for an injunction must be denied, the restraining order heretofore granted must be dissolved and the bill itself must be dismissed and it is so ordered.

(Endorsed.) No. 2355, Equity. W M McCain, et al vs. The City of Des Moines, et al. Opinion of Judge Shiras Filed January 11th, 1898. Ed. R. Mason, Clerk.

And on the same day there was entered in said cause the final decree of said Court, dismissing complainants' bill of complaint for want of jurisdiction, which said final decree is in words and figures following, to-wit:

United States Circuit Court, Southern District of Iowa, Central Division.

WALTER M. MCCAIN, CAROLIN M STEWART, EDWARD R. MASON, THE INDEPENDENT SCHOOL DISTRICT OF GREENWOOD AVENUE.	
vs.	
THE CITY OF DES MOINES, GEORGE SIMS AND C. D. BOARDMAN, Constituting the Board of Public Works of the City of Des Moines, THE DES MOINES BRICK MANUFACTURING COMPANY, and the INCORPORATED TOWN OF GREENWOOD PARK.	No. 2355, Equity.

FINAL DECREE.

This cause came on to be heard upon the complainants' motion for a temporary injunction herein and upon the defendants'

demurrer to the bill of complaint herein and the cause was submitted to the court upon complainants' amended and substituted bill filed herein and upon the defendants' demurrer thereto, or so much thereof as is set out in third division thereof raising the question of the jurisdiction of this court and the same was argued by counsel, Wm. G. Clark for complainants and N. T. Guernsey for Des Moines Brick Manufacturing Company, and J. K. Macomber for the City of Des Moines, George Sims and C. D. Boardman constituting the Board of Public Works of the City of Des Moines, and the court being now sufficiently advised in the premises, it is now here ORDERED, ADJUDGED AND DECREED that the complainants' motion for temporary injunction be and the same is hereby denied; that the restraining order heretofore entered herein on the tenth day of December, A. D, 1897, be and the same is hereby set aside, and that so much of defendants' demurrer to the complainants' bill of complaint as raises the question of the jurisdiction of this Court in this cause be, and the same is, hereby sustained, and said complainants electing to stand on their said bill and refusing to further plead, it is further ORDERED,
33 ADJUDGED AND DECREED that the complainants' bill of complaint be, and the same is hereby dismissed for want of jurisdiction in this Court to entertain this cause, with costs, and that the defendants, and each of them go hence without day and recover their costs herein taxed at $....., to all of which the complainant at the time excepted.

Whereupon the said complainants, by their counsel, having filed assignment of errors in open Court prayed an appeal to the Supreme Court of the United States, and also that this cause be certified to said Court as provided in Section Five of the Act of Congress entitled, "An Act to establish Circuit Courts of Appeal " and to define and regulate in certain cases the jurisdiction of " Courts of the United States and for other purposes," approved March 3d, 1891, and said appeal and certificate is allowed, and the said complainants now presenting in open Court a bond in the penal sum of three hundred dollars ($300), with sureties, as provided by law, the same is approved by the Court.

(Signed) O. P. SHIRAS,
U. S. District Judge,
Assigned to Southern District of Iowa.

(Endorsed) 2355, Equity. W. M. McCain, *et al. vs.* City of Des Moines, *et al.* Final Decree. Filed January 11, 1898.
34 E. R. Mason, Clerk.

And upon the request of the complainants, this Court now certifies to the Supreme Court of the United States for its decision the following questions of law:

1st. Do the averments of the amended and substituted bill of

complaint herein filed, show that the controversy or cause of action relied on by complainants arises under the Constitution or laws of the United States in such sense that the Circuit Court of the United States can entertain jurisdiction of the case.

2d. Is the controversy as shown by the averments of the amended and submitted bill, one over which the United States Circuit Court in and for the Southern District of Iowa can rightfully exercise jurisdiction.

It being further certified that the foregoing contains all of the record in said cause upon which the decree of dismissal was based.

Witness the Hon. Oliver P. Shiras, one of the judges of said Court, this 13th day of Jannary, 1898, being one of the days of the November Term, 1897, of said Circuit Court.

(Signed) OLIVER P. SHIRAS, *Judge.*

(Endorsed) No 2355, Equity. W. M McCain, *et al. vs.*
35 City of Des Moines, *et al* Certificate to Supreme Court.
Filed January 14, 1898. E. R. Mason, Clerk.

In the United States Circuit Court, Southern District of Iowa.

WALTER M. MCCAIN, *et al.*,
vs.
THE CITY OF DES MOINES, *et al.* } No. 2355, Equity.

ASSIGNMENT OF ERROR.

The complainants assign as error the following:

1. The Court erred in in holding that the amended and substituted Bill of Complaint herein did not show a controversy or cause of action arising under the Constitution or Laws of the United States, in such sense that the Circuit Court of the United States could entertain jurisdiction thereof

2. The Court erred in holding that the controversy, as shown by the amended and substituted Bill of Complaint was not one which the Circuit Court of the Uhited States for the Southern District of Iowa, could rightfully entertain jurisdiction.

3. The Court erred in dismising Complainants' Bill of Complaint for want of jurisdiction.

(Signed) WISHARD & CLARK,
Solicitors for Complainants.

(Endorsed) 2355, Equity. Walter M. McCain, *et al. vs.*
36 City of Des Moines, *et al.* Assignment of errors. Filed
January 11, 1898. E. R. Mason, Clerk.

Know all men by these presents, that we, Walter M McCain, Caroline M. Stewart, Edward R. Mason, The Independent School District of Greenwood Avenue, as principals and John W. Chase as surety are held and firmly bound unto the City of Des Moines, George Sims and C. D. Boardman, the Board of Public Works of

the said City of Des Moines, The Des Moines Brick Manufacturing Company and the Town of Greenwood Park in the full and just sum of Three Hundred Dollars to be paid to the City of Des Moines, George Sims and C D. Boardman, the Board of Public Works of said City, the Des Moines Brick Manufacturing Company, the Town of Greenwood Park, heirs, executors, administrators, jointly and severally by these presents.

Sealed with our seals and dated this eleventh day of January in the year of our Lord one thousand, eight hundred and ninety-eight.

Whereas, lately at the November Term, A. D., 1897, of the Circuit Court of the United States for the Southern District of Iowa in a suit depending in said Court between Walter M. McCain, Caroline M. Stewart, Edward R. Mason, The Independent District of Greenwood Avenue, plaintiffs, and the City of Des Moines, George Sims and C D. Boardman, The Board of Public Works of said City, The Des Moines Brick Manufacturing Company, The Town of Greenwood Park, defendants, a decree was ren-
37 dered against the said complainants and the said complainants have obtained a certificate and appeal of the said Court to reverse the decree in the aforesaid suit to be and appear in the United States Supreme Court in the City of Washington, D. C., thirty days from and after the date of said certificate and allowance of appeal.

Now the condition and obligation is such that if the said Walter M. McCain, Caroline M. Stewart, Edward R. Mason, Independent District of Greenwood Avenue shall prosecute said appeal to effect, and anwer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue

(Signed) WALTER M. MCCAIN.
CAROLINE M. STEWART. [SEAL]
EDWARD R. MASON. [SEAL]
INDEPENDENT DISTRICT OF GREENWOOD AVENUE,
By Wm. G. Clark, their Solicitor and Attorney of Record.
JNO. W. CHASE,
Surety.

STATE OF IOWA, } ss.
Polk County. }

John W. Chase, surety on the within bond, being duly sworn each for himself deposes and says, that he is worth, after paying his just debts, the sum of Six Hundred Dollars, exclusive of property exempt from execution, by the laws of the State in which he resides.

38 (Signed) JNO. W. CHASE.

Subscribed and sworn to before me by the above named John W. Chase this 11th day of January, 1898.

[SEAL] MAZE VERNON,
Notary Public, Polk County, Iowa.

Approved by
(Signed) O. P. SHIRAS,
U. S. District Judge, Assigned to the Southern District of Iowa.

(Endorsed) No. 2355, Equity. United States Circuit
39 Court, Southern District of Iowa. Walter M. McCain, *et al. vs.* The City of Des Moines *et al.* Bond on appeal. Filed 11th day of January, 1898. E. R. Mason, Clerk.

UNITED STATES CIRCUIT COURT, }
SOUTHERN DISTRICT OF IOWA. } ss.

I, Edward R. Mason, Clerk of the said Court for said district, do hereby certify that the foregoing transcript contains full, true and complete copies of the certificate of said Court, assignment of errors, supersedeas bond, which contains all the pleas, proceedings and record entries in a certain cause in said Court wherein Walter M. McCain, *et al.*, were complainants, and the City of Des Moines, *et al.*, were defendants.

In testimony whereof I hereunto set my hand and affix the seal of said Court at office, in the City of Des Moines, in said District, on this 26th day of January, A. D., 1898.

[SEAL.] EDWARD R. MASON,
40 *Clerk U. S. Circuit Court, Sonthern District of Iowa.*

Office Supreme Court U. S.
FILED
MAR 28 1900
JAMES H. MCKENNEY,
Clerk.

No. 230

Filed Mar. 28, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1899.

WALTER M. McCAIN, ET AL.,

Appellants,

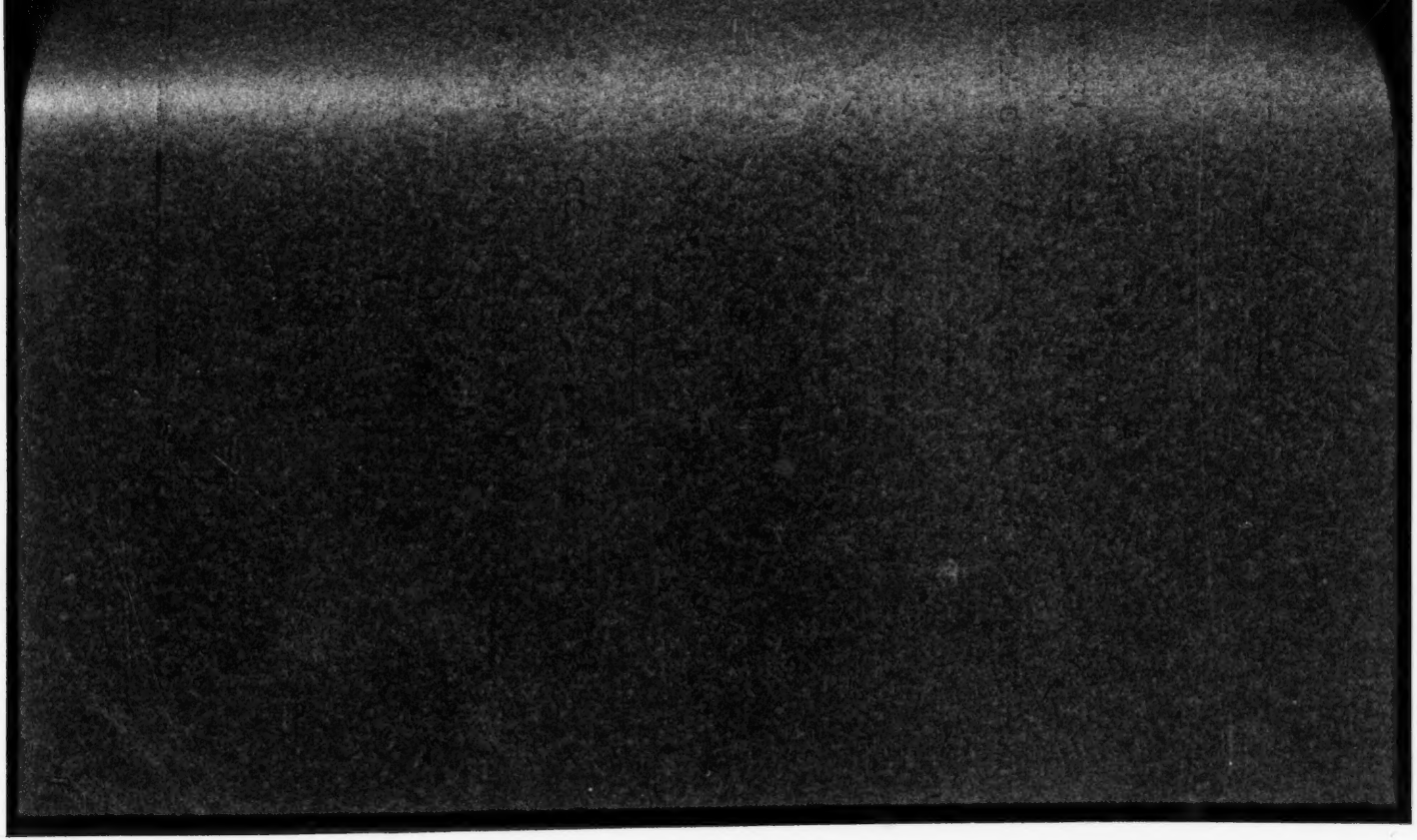
vs.

CITY OF DES MOINES, ET AL.,

Appellees.

BRIEF OF WALTER M. McCAIN, ET AL., APPELLANTS.

REPLY TO THE DES MOINES BRICK MANUFACTURING COMPANY, APPELLEE.



DARK PAGE BLEED THRU

NO. 238.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1898.

WALTER M. McCAIN, ET. AL.

APPELLANTS,

vs.

CITY OF DES MOINES, ET. AL.

APPELLEES.

BRIEF OF WALTER M. McCAIN, ET AL, APPELLANTS,

IN REPLY TO THE DES MOINES BRICK MANUFACTURING COMPANY, APPELLEE.

The questions in the case are in substance as stated in the appellees' brief.

It is true that one of the objects to be attained by the complainants' bill is to avoid the payment of special assessments on account of paving the street in front of the property of the appellants.

The simple question is then whether the case presented by appellants' bill is one arising under the Constitution of the United States and that depends upon the allegations of the bill and not upon the facts as they may subsequently turn out to be (*City Railway Co. vs. Citizens Street Railway Co.*, 166 U. S., 557.)

Complainants claim is, that under a law declared to be void and unconstitutional by the Supreme Court of the State of Iowa, the City of Des Moines, is still exercising municipal control and jurisdiction over the complainants' property. The decision of the Supreme Court of the State of Iowa, in the case of the *State ex rel West vs. the City of Des Moines*, 96 Iowa, 521, is misconceived by appellees.

The Supreme Court of the State of Iowa decided, in that case that the law was unconstitutional and void, but that the relator being a non-resident of the City of Des Moines, paying taxes in the annexed territory in the nominal sum of less than a dollar a year, in view of the peaceful relations that were existing, could not be heard so as to disturb the municipal authority of the City of Des Moines, over the territory where relator's property was. Appellants' bill does not attempt to test the corporate existence of the City of Des Moines, but simply to test the right of that corporation to levy taxes for certain purposes upon appellant's property; and in the case of *Wilson vs. Lambert*, 168 U. S., 611, this court said, that "Courts of equity have jurisdiction to hear the complaints " of those who assert that their lands are about to be assessed and " subjected to liens by a board or commission, acting in pursuance " of the provisions of a statute which has been enacted under the " forms of law, but which, it is claimed is unconstitutional and " therefore does not avail to confer the powers sought to be " exercised."

Appellees lay stress on the proposition that the bill is without equity and that the remedy is at law. Appellees concede thereby the jurisdiction of this court and necessarily of the Circuit Court

to determine these questions, and ask a discussion of the merits. This is exactly what is claimed by appellees. Let the Circuit Gourt entertain jurisdiction and give us a full hearing which we have never yet had in any forum, as to our constitutional rights Appellants earnestly desire their day in court, and an orderly discussion and hearing of the whole case.

Equity recognizes a trust relation between municipal corporations and the public. The abuse of such trust will be restrained in equity.

Langworthy vs. Dubuque, 13 Iowa. 86;

Hyde Park vs. Chicago, 124 Illinois, 156.

The bill also shows affirmatively the inadequacy of legal remedies and that repeated illegal assessments are threatened, thereby invoking equity to avoid multiplicity of actions.

The Circuit Court however dismissed the bill on the sole ground that the parties being citizens of Iowa, no federal question was presented by the record and therefore the court had no jurisdiction. (Record pp. 13, 15, 16.) The court expressly refrained from deciding the equities of the bill. Had its decision been adverse on the merits, complainants would have further amended the bill.

It is admitted by appellants that the control of municipal corporations is a matter that is peculiarly within the jurisdiction of the state, but it is insisted that such control must be exercised under due processes of law as found in the constitution of the particular state and valid statutes thereunder. The constitution and the statutes of the state have been wholly ignored in this case and municipal control and jurisdiction of the city of Des Moines unlawfully extended over the territory in which the complainants reside and thereby appellants' property subjected to the payment of municipal taxes from which they derive no benefit whatever.

When the facts in this case are developed, it will be made to appear that by the act complained of, which the Supreme Court of the State of Iowa has declared to be in violation of the constitution of the state of Iowa, there was brought into the municipal control of the City of Des Moines more than forty (40) square miles of agricultural lands used wholly for agricultuaral purposes.

In the case of *Morford vs. Unger*, 8th Iowa; the Supreme Court of the State of Iowa held that an unreasonable extension of the limits of a city, so as to take in lands used solely for agricultural purposes was the taking of private property for public use without compensation.

WM. E. MASON,
WM. G. CLARK,
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Brief of Guernsey for Appellees.

Supreme Court U.S.
MAR 16 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Filed Mar 16, 1899.

OCTOBER TERM, 1898.

NO. 288.

WALTER M. McCAIN, ET AL.,
Appellants.

vs.

CITY OF DES MOINES, ET AL.
Appellees.

FROM THE CIRCUIT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF IOWA.

On Behalf of the Des Moines Brick Manufacturing Company, Appellee.

N. T. GUERNSEY,
Attorney for Said Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

NO. 238.

WALTER M. McCAIN, ET AL,

vs.

CITY OF DES MOINES, ET AL.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF IOWA.

Brief of the Des Moines Brick Manufacturing Company, Appellee.

The sole question in this case is whether the court below erred in dismissing the complainant's bill for want of jurisdiction. While ostensibly brought to set aside the annexation of certain property to Des Moines, this suit is, in fact, an effort on the part of certain property holders to avoid the payment of a special assessment against them on account of the cost of paving a street in front of their property. There are no allegations that the work was not properly done, or that the property was not benefitted in an amount at least equal to the amount of the assessment, or that there were any irregularities or informalities in the letting of the contract, or in the levying of the assessment after the work was completed. It is contended, however, by the complainants that the territory within which the improvement was

made was not subject to the jurisdiction of the City of Des Moines because of an alleged invalidity in the annexation proceedings by which it was annexed to the city. They ask that the annexation proceedings be annulled, the annexed territory be cut off from the city, that all taxes levied by the city, including these special assessments, be declared invalid, and for a mandatory injunction requiring the old corporation formerly having jurisdiction over the annexed territory to resume its functions.

The facts are as follows: In the year 1890 and prior thereto the City of Des Moines was a city of the first class organized under the general incorporation laws of the state of Iowa, and the Town of Greenwood Park was an incorporated town organized under the same laws. The town of Greenwood Park embraced a comparatively small amount of territory adjoining the City of Des Moines upon the west. By an act of the legislature of Iowa, approved March 13, 1890, which is printed on pages six *et seq.* of the brief of appellants, it was provided that the Town of Greenwood Park and other property adjacent to the then City of Des Moines should be annexed to and become a part of the said city. This act provides for an immediate reorganization of the city, the date of the first election being fixed as the first Monday in April, 1890, a little over two weeks after the bill was enacted. In October, 1897, about seven and one half years after the reorganization of the City of Des Moines under the provisions of this act, the complainants filed this bill. The bill was dismissed for want of jurisdiction.

The contention of the complainants is that the annexation law was invalid because within the inhibition of the constitution of Iowa prohibiting special legislation as to such matters; and that therefore the annexation proceedings are invalid, so that the taxes levied by the City of Des Moines on the annexed territory were levied without authority of law and consequently, that the levy of such taxes constituted a taking of their property without due process of law and in

contravention of the provisions of the federal constitution.

Another claim asserted is that because the annexation proceedings were not had under a law that applied to every municipality in the state, the citizens of this annexed territory have been deprived of the equal protection of the laws.

The case turns solely upon the construction of the constitution and laws of the state of Iowa. After the annexation proceedings had been had, an action in *quo warranto* was commenced on the relation of one A. G. West in order to test the validity of the annexation proceedings which are here in question. This case went to the supreme court of Iowa, where it was decided at the January term, 1896. See State ex. rel. vs. City of Des Moines, 96 Iowa, 521. In this case it was held that the annexation law was vulnerable to the objection, that it was special legislation in contravention of the constitution of Iowa, but that the acquiescence in the annexation proceedings had been so long continued that even the state was estopped from questioning their validity or the jurisdiction of the city of Des Moines over this annexed territory.

In the case of Windsor vs. City of Des Moines, which was decided by the supreme court of Iowa on February 12, 1897 and is reported in 101 Iowa, 343, the validity of the contract for the paving in question in this suit was directly involved, some of the complainants to this suit being parties to that one, and it was there decided by the supreme court of Iowa that this contract is a valid one.

POINTS.

I.

The control of municipal corporations is a matter that is peculiarly within the jurisdiction of the state.

Cooley's Constitutional Limitations, 6th Ed., p. 228.
Dillon on Municipal Corporations, 4th Ed., Sec. 185.

Laramie County vs. Albany County et al, 92 U. S., 307.
Mt. Pleasant vs. Beckwith, 100 U. S., 514-524.
Meriwether vs. Garrett, 102 U. S., 472-501.

II.

In matters of state law, the federal courts are bound by the construction adopted by the state courts.

Town of South Ottawa vs. Perkins, 94 U. S., 268.
Leeper vs. Texas, 139 U. S., 462-467.
Marchant vs. Penn. R. R. Co., 153 U. S., 380.
Iowa Central Ry. Co. vs. Iowa, 160 U. S., 389.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

III.

The allegations of their bill do not show that the complainants have been deprived of their property without due process of of law.

Leeper vs. Texas, 139 U. S., 462-467.
Baldwin vs. Kansas, 129 U. S., 52.
Kelley vs. Pittsburgh, 104 U. S., 80.
Marchant vs. Penn. R. R. Co., 153 U. S., 380.
Iowa Central Railway Co. vs. Iowa, 160 U. S., 389.
Conde vs. York, 168 U. S., 642-648.

IV.

The cases cited in the opinion of the court below amply sustain it in going to the essence of this controversy to determine its character.

Starin et al. vs. New York, 115 U. S., 248-257.
Shreveport vs. Cole, 129 U. S., 36-41.
New Orleans vs. Benjamin, 153 U. S., 411.

V.

The facts alleged do not show that the complainants have been denied the equal protection of the laws.

Missouri vs. Lewis, 101 U. S., 22.
Hayes vs. Missouri, 120 U. S., 68.
Moore vs. Missouri, 159, U. S., 673.
Marchant vs. Penn. R. R. Co., 153 U. S., 380, 389.

The rule has been to create municipal corporations by special acts.

Dillon on Municipal Corporations 4th Ed., Sec. 39.
Burke vs. Jeffries, et al. 20 Iowa, 145.
Dillon on Municipal Corporations, 4th Ed., Sec. 44.

VI.

Proceedings to test the validity of a municipal corporation must be by an action in quo warranto.

Sharpleigh vs. San Angelo, 167 U. S., 646, 651.
Graham vs. City of Greenville, 67 Texas, 62.
Town of Decorah vs. Gillis, et al, 10 Iowa, 234.
Beach on Public Corporations, Sec. 55.
Cooley's Constitutional Limitations 6th Ed., pp. 309 and 310.
National Life Ins. Co. vs. Board of Education, 62 Fed. Rep., 778.
Ashley vs. Board of Supervisors, 60 Fed. Rep., 55.
Powell vs. City of Greensburg, 49 N. E. Rep., 955.
Clement vs. Everest, 29 Mich., 19-22.
Town of Geneva vs. Cole, 61 Ill., 397.
Tisdale vs. Town of Minonk. 46 Ill., 9.
Beach on Public Corporatiens, Sec., 55.
Dillon on Municipal Corporations, Secs. 43 and 994.
Color vs. Dwight Township, 55 N. W. Rep., 587.
Black vs. Town. of Brinkley, 15 S. W. Rep., 1030.
Mendenhall vs. Burton, 22 Pac., 558.
Railroad Co. vs. Wilson, 6 Pac., 281.

School District vs. School District, 26 Pac., 43.
Railway Co. vs. Shires, 108 Ill., 625.
School District vs. Inspectors, 27 Mich., 2.
People vs. Maynard, 15 Mich. 470.,
Stuart vs. School District, 30 Mich., 3.
McCleskey vs. State, ex. rel. 23 S. W. Rep., 518.

I.

The control of municipal corporations is a matter that is peculiarly within the jurisdiction of the legislature of the State.

This preliminary proposition cannot be controverted. It is of importance here because it is an exercise of this power that is the fundamental basis of the complaint which is made by the appellants. Judge Cooley, in his work on Constitutional Limitations, Sixth Edition, p. 228, says:

> "The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether in the legislative discretion, and substitute those which are different. The rights and franchises of such a corporation, being granted for the purpose of government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense that the constitutional provision which prohibits the obligation of contracts being violated. Restraints on the legislative power of control must be found in the constitution of the State, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot box all these wrongs."

The same rule is laid down by Judge Dillon in his work on Municipal Corporations, Fourth Edition, Section 185, from which we quote as follows:

"Not only may the legislature originally fix the limits of the corporation, *but it may, unless specially restrained in the constitution, subsequently annex, or authorize the annexation of, contiguous or other territory*, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this *power of compulsory annexation* that the territory thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restrictions, belongs wholly to the legislature to determine."

The doctrine is fully stated by this court in the case of Laramie County v. Albany County et al, 92 U. S., 307. We quote from the opinion as follows:

"Counties, cities and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides. Beyond doubt, they are, in general, made bodies politic and corporate; and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State.

Trusts of great moment, it must be admitted, are confided to such municipalities; and, in turn, they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature: but it is settled law, that the legislature, in granting it, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted.

Uuless the constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion. Cooley on Const., 2d Ed., 192."

* * * * *

Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatable with everything of the nature of compact. *Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones*, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. School Society v. School Society, 14 Conn., 469; Bridge Company v. East Hartford, 16 id., 172; Hampshire v. Franklin, 16 Mass., 76; North Hemstead v. Hemstead. 2 Wend., 109; Montpelier v. East Montpelier, 29 Vt., 20; Sill v. Corning, 15 N. Y., 197; People v. Draper, id., 549; Waring v. Mayor, 24 Ala., 701; Mayor v. The State, 15 Md., 376; Ashley v. Wellington, 8 Pick., 524; Baptist So. v. Candia, 2 N. H., 20; Denton v. Jackson, 2 Johns. Ch., 320.

Political subdivisions of the kind are always subject to the general laws of the State; and the Supreme Court of Connecticut decided that the legislature of the State have immemorially exercised the power of dividing towns at their pleasure, and upon such division to apportion the common property and the common burdens as to them shall seem reasonable and equitable. Granby v. Thurston, 23 Conn. 419; Yarmouth v. Skillings, 45

Me., 142; Langworthy v. Dubuque, 16 Iowa, 273; Justices' Opinion, 6 Cush., 577.

* * * * *

Old towns may be divided or a new town may be formed from parts of two or more existing towns; and the legislature, if they see fit, may apportion the common property and the common burdens, even to the extent of providing that a certain portion of the property of the old town shall be transferred to the new corporation. Bristol vs. New Chester, 3 N. H., 521.

In dividing towns, the legislature may settle the terms and conditions on which the division shall be made. It may enlarge or diminish their territorial liabilities, may extend or abridge their privileges, and may impose new liabilities. Towns, says Richardson, C. J., are public corporations, created for purposes purely public, empowered to hold property, and invested with many functions and faculties to enable them to answer the purposes of their creation.

There must, in the nature of things, be reserved, by necessary implication, in the creation of such corporations, a power to modify them in such manner as to meet the public exigencies. Alterations of the kind are often required by public convenience and necessity; and we have the authority of that learned judge for saying that it has been the constant usage, in all that section of the Union, to enlarge or curtail the power of towns, divide their territory, and make new towns, whenever the convenience of the public requires that such a change should be made."

This doctrine is reiterated in

Mt. Pleasant vs. Beckwith, 100 U. S., 514-524.

Meriwether vs. Garrett, 102 U. S., 472-501.

These cases fully support the proposition that there is nothing in the federal constitution which imposes any direct limitation upon the powers of the states over the organization of municipal corporations. These corporations are purely creations of the state legislature, and so far as the federal

constitution is concerned, exist merely at the will of the legislature of the state.

In the case at bar, the sole contention of the appellants is that the state of Iowa has violated their rights under the federal constitution by merging the Town of Greenwood Park into the city of Des Moines. Under the federal constitution, neither the Town of Greenwood Park nor its citizens, had any vested right in the continuation of the corporate existence of the Town of Greenwood Park; nor did the federal constitution confer upon them any right to maintain this existence, or to prevent the merger of the town into another municipal corporation, or to fix the terms upon which such consolidation might be made. This relation which a municipal corporation sustains to the state in its character as a mere subordinate agency to aid the legislature in performing the functions of government is especially material in the determination of the questions which are suggested by this appeal.

II.

In matters of state law, the Federal Courts are bound by the construction adopted by the state courts.

Town of South Ottawa vs. Perkins, 94 U. S., 268.
Leeper vs. Texas, 139 U. S., 462-467.
Marchant vs. Pennsylvania R. R. Co., 153 U. S., 380.
Iowa Central Railway Company vs. Iowa, 160 U. S., 389.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

The sole question in this case is as to the effect of the construction of the laws of the State of Iowa. If, under its laws the annexation proceedings were valid, then the authority to impose these various burdens existed, and the entire case made by the complainant's bill falls. If, on the other hand, these proceedings are invalid under the laws of Iowa, in a proper proceeding the courts of that state will so decide; but this again involves nothing that brings in question any of the

provision of the Constitution of the United States.

As was said by Judge Shiras in his opinion in the court below, "the determination thereof depends wholly on the construction of the state constitution and laws, and it is a question upon which the decision of the supreme court of the State is absolutely binding upon this court." Not only is this true but this is a question which the supreme court of the State has already decided in State *ex rel.* West vs. City of Des Moines, 95 Iowa, 521. In that case the supreme court of Iowa decided definitely and unequivocally in favor of the validity of the annexation. It is true that in that case the supreme court of Iowa decided that the statute in question is unconstitutional, because special; but it also decided after an exhaustive consideration of the question, that the state, by reason of its acquiesence in the annexation proceedings, was estopped from assailing the validity of the proceedings in question,

That suit was brought about four years after the annexation proceedings were had. The complainants here acquiesced in them for almost another four years. Even if it were true that they have the right, in a private suit of this character, to question the validity of the annexation proceedings, the law of Iowa, as announced in State ex. rel. West vs. City of Des Moines, is that by reason of this delay and laches, and by reason of the complications that would ensue because of such delay, the complainants could in no event maintain the present bill. In the case at bar, this court is bound by the law of Iowa, as announced in the opinion to which we have just referred. If this case were to be considered upon the merits, the first question presented to the federal court would be the constitutionality of the annexation law, and upon this question that court would be bound by the decision in the case of the State ex. rel. West vs. City of Des Moines; and the next question that would be presented to that court would be the effect of delaying for seven years the attack upon the validity of the annexation

proceedings, and upon this question the federal court would again be bound by the decision of the Supreme Court of Iowa in the case to which reference has just been made.

The application to the facts of this case of the rule that this court is bound by the decisions of the State courts in matters arising under the State laws emphasize the proposition that this case involves nothing save questions arising under the State laws. Nothing, perhaps, demonstrates this more clearly than the fact that this court could not grant to the complainants the relief for which they pray in this action without overruling the State ex. rel. West vs. City of Des Moines upon the two questions of purely local law, which are the only questions that are decided in that case.

III.

The Allegations of the Bill do Not Show That the Complainants Have Been Deprived of Their Property Without Due Process of Law.

The mere general averments in the bill, that rights claimed by the complainants under the Constitution of the United States have been infringed, cannot be relied upon to import into the case a federal question. If the case is "one arising under the Constitution * * * of the United States," this must appear from the facts which are set out as the foundation of the claim which is asserted by the complainants. If those facts do not show that this suit so arises, but, on the contrary, show that it involves solely a question of State law, then the character of the controversy cannot be changed by charging a legal conclusion where the facts are such that such a conclusion cannot properly be drawn from them.

The right of the complainants to relief upon their theory of this case depends solely upon the question as to the validity of the annexation of the Town of Greenwood Park to the City of Des Moines. If that annexation is valid, either by virtue of the statute, or by virtue of anything else, their

whole case falls. If, on the other hand, the annexation is invalid for any reason, upon the theory of the bill they are entitled to the relief which they demand, and nothing is left in the case except to make the formal proof in order to furnish the basis for the details of the decree which should annul the annexation proceedings. This question as to the validity of the annexation proceedings is a question solely of state law. It is, as we have seen, a matter that is peculiarly within the jurisdiction of the local authorities. It is a matter as to which the constitution of the United States imposes no restrictions upon the local authorities.

This is well illustrated by the recent case of Forsyth vs. Hammond, 166 U. S., 506. In that case the question involved the validity of certain annexation proceedings in the state of Indiana. The annexation has been sustained by the state courts. In an action pending in the federal court, the circuit court of appeals has rendered an opinion holding the annexation invalid. Under these circumstances, before the final determination of the case in the federal court, and because of this conflict between these two courts of concurrent jursdiction, this court granted a writ of certiorari, and, after full consideration of the matter, sent the case back to the circuit court for the District of Indiana, with instructions to follow the decision of the supreme court of Indiana by dismissing the bill. In that case, page 518, these questions are recognized as matters of a purely local nature involving only questions arising under the state constitution and statutes, and as therefore questions as to which this court is concluded by the judgment of the state court.

The only question in the case at bar is whether the annexation proceedings are valid under the laws of Iowa.

In Leeper vs. Texas, 139 U. S., 462-467, this court expressly says that such a question is not a federal question. We quote as follows:

"It must be regarded as settled. * * * That whether the statutes of a legislature of a State have been

duly enacted in accordance with the requirements of the constitution of such State, is not a federal question, and the decision of state courts as to what are the laws of the State is binding upon the courts of the United States."

In Baldwin vs. Kansas, 129 U. S., 52.

It was contended that in convicting the defendant, there had been a disregard of the laws and the constitution of the state of Kansas, and that therefore, the conviction was without due process of law and in violation of the federal constitution. This court disposes of this contention in a very summary manner, saying, on page 57:

"The question whether the evidence in the case was sufficient to justify the verdict of the jury, and the question whether the constitution of the state of Kansas was complied with or not in the proceedings on the trial which are challenged, are not Federal question which this court can review."

A case strongly in point is the case of

Kelly vs. Pittsburg 104 U. S., 80.

There, by an act of the legislature, certain outlying land was made a part of the City of Pittsburg. Kelly filed his bill to restrain the levy of taxes upon this property for city purposes, asserting that the land was taxed enormously beyond its value, so as to almost destroy his interest in the property. He set up the fifth and fourteenth amendments to the Constitution. This case clearly recognizes the doctrine that the question as to the organization of cities and towns is one of local jurisdiction involving no federal question.

Another case to which we call attention is

Marchant vs. Pennsylvania R. R. Co., 153 U. S., 380.

There the plaintiff claimed damages on account of the operation of an elevated railroad belonging to the Railroad

Company and abutting on the south side of Filbert street in the City of Philadelphia, in front of plaintiff's property. The question as to the plaintiff's right to recover depended upon the laws and constitution of the state of Pennsylvania. The court says in this connection:

> "We are not authorized to inquire into the grounds and reasons upon which the supreme court of Pennsylvania proceeded in its construction of the statutes and constitution of that state, and if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason."

In Iowa Central Railway Company vs. Iowa, 160 U. S., 389, the decision again turned upon whether a federal question could be predicated upon an erroneous construction by the state tribunals of the state laws. In that case this court says:

> "Whether the court of last resort of the state of Iowa properly construed its own constitution and laws in determing that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the state empowered by the laws of the state to review and correct errors committed by by its courts. Such errors affect merely matters of state law and practice, in no way depending upon the Constitution of the United States or upon any act of congress."
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> * * * * *
>
> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of the state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy

pending before it that the averments of an answer set forth no defence to the claim of the plaintiff.

It was not a denial of right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to construe the laws of the state as justifying the refusal."

In Conde vs. York, 168 U. S., 642-648, this court says:

"In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be a title or right of the plaintiff in error and not a third person only; *and the statute or authority must be directly in issue.*"

The authorities which we have cited clearly demonstrate that this case is not one arising under the Constitution of the United States. If the state of Iowa were an independent sovereignty, so that the Constitution of the United States might be eliminated from the consideration of this case, it would in no wise affect the questions which are presented, or the conclusions which it would be necessary to reach in their determination.

The argument of appellants apparently is that because the annexation proceedings are invalid, exercise of municipal authority by the City of Des Moines is unauthorized and that consequently any taking of their property thereunder is unlawful, so that it is without due process of law, and in contravention of the federal Constitution. If this course of argument were sound, there would be no case in which it is claimed that a statute was in violation of the state constitution which would not present a federal question. It would give the Circuit Courts original jurisdiction over every case involving a claim that a state statute was in violation of a state constitution. It would go further than this, giving the Circuit Court jurisdiction over all cases where the validity of a state statute was, for any reason, drawn in question.

Such cases are not cases which arise under the Constitution of the United States. It is not directly brought in question. In all of such cases the state tribunal is the proper tribunal to determine whether or not the enactment of the state legislature is valid. In the case at bar, if the complainants, instead of filing their bill in the federal court, had filed it in the proper state court, that court could have decided every question presented by these facts without any reference to the Constitution of the United States. In the case of the State ex rel. West vs. City of Des Moines, already referred to, the supreme court of Iowa has decided these questions. The complainants cannot come into the federal court and by an unwarranted averment that the case involves a federal question, seek in that court relief to which the supreme court of the State has held that they are not entitled. They cannot, by indirection, review in this court the decision of the supreme court of the state upon a purely local question.

IV.

The cases cited in the opinion of the court below, amply sustain it in going to the essence of this controversy to determine its character.

We quote from Starin et al vs. New York, 115 U. S., 248-257, as follows:

> "We will first consider whether the suit is one which arises under the Constitution or laws of the United States; for, if it is not, the order to remand was right, so far as the removal upon the application of all the defendants is concerned.
>
> The character of a case is determined by the questions involved. Osborn v. Bank of United States, 9 Wheat, 737, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United

States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this subject. Cohens v. Virginia, 6 Wheat., 264, 379; Osborn v. Bank of United States, 9 Wheat., 737, 824; The Mayor v. Cooper, 6 Wall., 247, 252; Gold Washing & Water Co. v. Keyes, 96 U. S., 199, 201; Tennessee v. Davis, 100 U. S., 257, 264; Railroad Co. v. Mississippi, 102 U. S., 135, 140; Ames v. Kansas, 111 U. S., 449, 462; Kansas Pacific v. Atchison Railroad, 112 U. S., 414, 416; Provident Savings Co. v. Ford, 114 U. S., 635, 641; Pacific Railroad Removal Cases, 115 U. S., 1, 11."

Continuing, the court finds that the controversy in that case depended upon the constrution of the charter of the City of New York, and upon whether the ferries in question came within the monopoly granted to the city. The court says further:

"The decisions of these questions does not depend upon the Constitution or laws of the United States. There is nothing in the Constitution or laws of the United States entering into the determination of the cause which, if construed one way will defeat the defendants or in another sustain them."

This extract is entirely applicable to the case at bar. Whether the annexation in question was valid depends upon the laws of Iowa, and there is nothing in the Constitution or laws of the United States which, if construed one way will sustain this annexation, or if construed another way will overthrow it.

In Shreveport vs. Cole, 129 U. S., 36-41, this court says:

"Unless this suit was one 'arising under the Constitution or laws of the United States,' the Circuit Court had no jurisdiction; *and if it did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or some law, upon the determination of which the recovery depended, then it was not a suit so arising.* Starin vs. New York, 115 U. S., 248, 257; Gold Washing & Water Co., vs. Keyes, 96 U. S., 199.

The case at bar was in effect an action at law to

recover a balance alleged to be due the petitioners or plaintiffs upon a contract with the defendant, and the maintainance of the cause of action involved no Federal question whatever, nor is any such indicated in the judgment rendered. But the jurisdiction seems to have been rested upon the averments in plaintiffs' petition, that under article 209 of the state constitution of 1879, providing that 'no parish or municipal tax for all purposes whatsoever shall exceed ten mills on the dollars of valuation,' the city of Shreveport, being so situated as to need all the revenue from such a tax. cannot raise funds to pay its just debts; that, therefore. plaintiffs are deprived by that article, 'if same be valid and operative,' of the remedy of enforcing payment by the levy of taxes, although their contract was entered into in 1871; and that so said article impairs the obligation of such contract. This contention, however, required the Circuit Court to assume that the courts of Louisiana would hold that the city could lawfully avail itself of the constitutional limitation in question as a defense to the collection by taxation of the means to liquidate the indebtedness, notwithstanding that would be to apply it retrospectively, to the destruction of an essential remedy existing when the contract was entered into, whereas the presumption in all cases is that the courts of the states will do what the Constitution and laws of the United States require. Chicago & Alton Railroad vs. Wiggins Ferry Co., 108 U. S. 18; Neal vs. Delaware, 103 U. S. 370, 389. And we find in accordance with that presumption that the Supreme Court of Louisiana holds, and had held prior to the commencement of this suit, that article 209 'must have a rigid enforcement with regard to all creditors whose rights are not protected by the Constitution of the United States, and with regard to all future operations of the city government of every kind whatever. But it is perfectly clear that the rights of antecedent contract creditors are protected by the Constitution of of the United States, and they are entitled to have them enforced 'in all respects as if' this provision of the Constitution 'had not been passed.' Von Hoffman vs. City of Quincy, 4 Wall., 535. The fact that the act of the State is a constitutional provision instead of a mere legislative act does not effect the case. Railroad Co. vs. McClure, 10 Wall., 511, 515. It is apparent, therefore, that whatever percentage of taxation may be required to meet the ma-

turing obligations in interest or principal of antecedent contract creditors must, in any and all events, be levied.' Moore vs. City of New Orleans, 32 La. Ann., 726, 747."

In conclusion, in the case just referred to, this court says:

"As remarked in Bernards Township vs. Stebbins, 109 U. S., 341, 353, it has been the constant effort of Congress and of this court to prevent the discrimination in respect to suits between citizens of the same state and suits between citizens of different states, established by the Constitution and laws of the United States, 'from being evaded by bringing into Federal courts controversies between citizens of the same state.' We regard this suit as an evasion of that character."

We submit that this is entirely applicable to the case at bar.

The court below says:

"There can be no question that the complainants herein could have brought the suit in the State Court had they chosen that forum; can there by any question that they could have presented every ground they rely upon as a foundation for the claim that the asserted extension of the corporate limits and corporate powers of the City of Des Moines over their property is illegal and therefore invalid, without quoting any section of clause of the Federal Constitution or laws? Is it not clear that whatever court undertakes to pass upon the rights sought to be enforced in this case must solve the problems by a construction of the State Constitution and laws, and that in determining the pivotal question whether the property formerly included within the Town of Greenwood Park is now within the limits and subject to the control of the City of Des Moines, no clause or provision of the Federal Constitution or laws will be referred to or be brought up for consideration. It must then be held that this case is not one wherein the rights of the complainants to ask a decree restraining the City of Des Moines from continuing to exercise corporate authority over the territory in question is based upon any provision of the Federal Constitution or laws and as the right of recovery or to the relief sought would not be

affirmed by one construction or denied by another construction of the Federal laws, it cannot be rightfully said that the controversy is one arising under the Federal Constitution or laws and jurisdiction in this Court cannot be maintained on that ground.

Equally unavailing are the general averments that unless restrained the city of Des Moines will continue to exercise its corporate authority over the property of complainants; will continue the work of improving the streets in the territory of Greenwood Park and will levy taxes on the property therein for the payment of street improvements and of the city debt, and that thereby the property of complainants will be subjected to burdens without due process of law and be taken without compensation. It is open to complainants to attack the validity of the asserted extension of the city limits in the state courts, unless that question is settled by the decision of the supreme court of Iowa in the case already cited. There is no provision in the laws of Iowa which preclude the complainants from obtaining a hearing upon all the questions which are presented by the bill filed in this suit. Of a case brought for that purpose the state court would have jurisdiction. If in the progress thereof the complainants should seek to rely upon any right or immunity granted by the federal constitution or laws, the state court could give them the full benefit thereof, or if such benefit was refused, the parties could carry the question before the supreme court of the United States and obtain protection therefrom. Thus in New Orleans vs. Benjamin, 153 U. S., 411, a case which in some of its features is similar to the one now under consideration, it was held that the circuit court had not jurisdiction, it being therein said that 'Ordinarily the question of the repugnancy a state statute to the impairment clause of the constitution is to be passed upon in the state courts in the first instance, the presumption being in all cases they will do what the constitution and laws of the United States require. Chicago & Alton R. R. Co. vs. Wiggins Ferry Co., 108 U. S., 18; and if there be ground of complaint for their decision, the remedy is by writ of error under Section 709 of the Revised Statutes." It is not claimed or averred in this bill, nor could it be so claimed rightfully, that under the constitution and laws of Iowa, a party can be deprived of his property without giving him his day in court, or that property can be taken

for a public use without due compensation, or that provision is not made enabling every one whose property is assessed and taxed, to question the validity of the tax. When traced to its real foundation, the claim asserted by complainants, that without due process of law, their property is being burdened with assessments is based upon the theory that the laws of Iowa do not afford them ample means for testing the validity of the assessments made, but it is based upon the claim that their property is not within the limits of the city of Des Moines, is not therefore subject to the control of the city authorities and cannot be lawfully assessed or taxed by them. It is manifest, however, that the legality or illegality of the actions the city is dependent upon the question whether the territory of Greenwood Park now forms part of the city of Des Moines, and the existence of this disputed question does not show that the complainants are in any proper sense denied due process of law for the protection of their rights or that they are denied the equal protection of the laws within the meaning of the federal constitution."

Tested by the rule of this court in

New Orleans vs. Benjamin, 153 U. S., 411,

The jurisdiction must undoubtedly fall, and the decree of the court below must be sustained.

We quote from the Benjamin case as follows:

"The first and third question propounded relate to the jurisdiction of the Circuit Court, which was invoked on two grounds: (1). That the case was one arising under the Constitution of the United States; and (2) on diverse citizenship.

1. When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, then it is not a suit arising under the Constitution. Shreveport vs. Cole, 129 U. S., 36; Starin vs. New York, 115 U. S., 248,257; Gold Washing & Water Co. vs. Keyes, 96 U. S., 199.

The judicial power extends to all cases in law and equity arising under the Constitution, but these are

cases actually and not potentially arising, and jurisdiction cannot be assumed on a mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and the laws of the United States require, Chicago & Alton Railroad Co. vs. Wiggins Ferry Co., 108 U. S. 18; and if there be ground of complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes. Congress gave its construction to that part of the Constitution by the twenty-fifth section of the Judiciary Act of 1789, and has adhered to it in subsequent legislation."

The case at bar does not really and substantially involve any dispute or controversy as to the effect or construction of the constitution of the United States, upon the determination of which the result depends, and is not a suit arising under the constitution.

V.

The facts alleged do not show that the complainants have been denied the equal protection of the laws.

The complainants very briefly present the claim that they have brought themselvss within the provision of the federal constitution, which guarantees to each citizen the right to the equal protection of the laws. The theory of the complainants upon this proposition is left by their brief and by their bill largely to inference.

Their argument apparently is that since there were other statutes of the state of Iowa at the time the annexation law was passed under which this territory might have been annexed, which statutes were applicable generally throughout the state, therefore, the annexation by virtue of this statute

denied them the equal protection of the laws, in that the provisions of this law differed from those which were applicable to the state generally.

This argument assumes that there is a statute here which is binding upon the complainants, but not binding upon all others similarly situated, or upon all other citizens of the state. One fundamental error in it is that it ignores the fact that in sustaining this annexation, the supreme court of the state has not only not assumed that this statute is valid, or that the appellants are bound by it, but has further expressly decided that the statute is unconstitutional; and has sustained the annexation, not under the statute, but without reference to the statute, and solely upon the proposition that acquiescence has estopped the state from asserting that the proceedings were invalid.

This proposition is a proposition of law that is applicable to every citizen of the state, so that in this controversy there is involved neither any statute nor any rule of law that is not generally applicable to every citizen of the state of Iowa. The jurisdiction of the City of Des Moines over this territory is not sustained by a void statute. The City of Des Moines could not assert the right to exercise jurisdiction over this territory under the statute in question, because in the State *ex rel.* West vs. City of Des Moines, the supreme court of Iowa has decided that this statute is void, and that the City of Des Moines acquired no rights by virtue of it. The sole basis of the City's right in the premises is the estoppel. The entire argument of the appellants upon this question is predicated upon the erroneous assumption that the rights of the City are exercised by virtue of this void statute.

But if they were right in their contention that the City's authority is exercised by virtue of this void statute, applicable only to the enlarged City of Des Moines, their contention that this constitutes a denial of the equal protection of the laws is unsound. It is not claimed that this statute does not operate with equal effect upon all persons within the limits

of the enlarged City. Under these circumstances, there is no infringement of this constitutional right.

A case strongly in point is

Missouri vs. Lewis, 101 U. S., 22.

Under the constitution and laws of Missouri, an appeal lies to the supreme court of that state from any final judgment or decree of any circuit court, except those in four counties and in the city of St. Louis, for which counties and city there is established a court of appeals, called the St. Louis court of appeals, which has exclusive jurisdiction over all the appeals from the said counties and city. From the St. Louis court of appeals an appeal lies to the supreme court only in cases where the amount in dispute, exclusive of costs, exceeds two thousand five hundred dollars, and in cases involving constitutional questions. The case under consideration was not appealable from the St. Louis court of appeals, but if it had arisen in the circuit court of another county, it would have been appealable to the supreme court. It was contended that these facts constituted a denial to the suitors in the courts of St. Louis of the equal protection of the laws. We quote from the opinion as follows:

"If, however, we take into view the general objects and purposes of the Fourteenth Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all native and naturalized persons, and to prohibit the states from abridging their privileges or immunities, and from depriving any persons from life, liberty, or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made.

* * * * * *

The last restriction, as to the equal protection of the

the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress.

* * * * *

The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the fourteenth amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards different parts of a state, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies."

Another case involving this proposition is

Hayes vs. Missouri, 120 U. S., 68.

It was provided by the laws of Missouri that in all capital cases, except in cities having a population of over one hundred thousand inhabitants, the state should be allowed eight peremptory challenges to jurors, and, in such cities, fifteen. The plaintiff in error, having been sentenced to death on a charge of murder, asserted that he had been denied the equal protection of the law, because of this discrimination in

the number of peremptory challenges allowed the state. In this case the court says:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privilege conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment,' 113 U. S., 27, 32."

Another case of a somewhat similar character is

Moore vs. Missouri, 159 U. S., 673.

The same rule is also announced in

Marchant vs. Pennsylvania. R. R., 153 U. S., 380–389.

From which we make the following extract:

"The question thus raised is within the case of Missouri vs. Lewis, 101 U. S., 22, where it was said that 'the clause in question means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances.' So in Hayes vs. Missouri, 120 U. S., 68, where by a statute of the State of Missouri it was provided that, in capital cases, in cities having a population of over one hundred thousand inhabitants, the state shall be allowed fifteen peremptory challenges, while elsewhere in the state it is allowed only eight peremptory challenges, it was held that such a distinction did not deny to a person accused and tried for murder in a city containing over one hundred thousand inhabitants the equal protection of the laws enjoined by the Fourteenth Amendment, and in the course of the discussion it was said: "The Fourteenth Amendment to

the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. As we said in Barbier v. Connolly, 113 U. S., 27, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.'"

There is nothing in the case of Gulf, Colorado and Santa Fe Railway Company vs. Ellis, 165 U. S., 150, which in any degree militates against the doctrine which is announced in the cases to which we have referred. The act in question there was an act imposing a penalty. It was a gross and radical discrimination against railroad companies. If the litigation terminated adversely to them, they were compelled to pay the attorney fees of the successful plaintiff. If the companies were successful, they could not recover any attorney fee. The statute was unequal. If the statute had provided that in all suits of the character therein described, the successful party could recover attorney fees, this objectionable element of discrimination would have been lacking. It was this element of unfairness and injustice that justified the conclusion reached in the Ellis case.

Municipal corporations have been created from time immemorial by grant of special charters and by special acts of legislature. At present, there are many states in which they are so created. In the state of Iowa, there are several cities organized under special charters, which were granted before the adoption of the present constitution of the state. It is not even contended that to so create a municipal corporation or to so enlarge its boundaries constituted a denial of the equal protection of the laws.

An examination of the history of the creation of municipal corporations shows that until a comparatively recent date, both in this country and in England, such corporations have been organized usually by special charter. It was not until 1835 that England adopted a general law for the incorporation of municipalities. Dillon's Municipal Corporations, Fourth Edition, Par. 36. In Dillon's Municipal Corporations, Fourth Edition, Sec. 39, it is said:

> "Until a comparatively a recent period, municipal corporations have been created singly, each with its special or separate charter passed by the legislature of the State. These charters, in all of the states, were framed after the same general model; but in the extent of the special powers conferred, and in the peculiar constitution of the governing body, and the like, there was great variety."

As a matter of fact, the City of Des Moines was created by a special act of the legislature of the State of Iowa, approved on the 28th day of January, 1857. It was not until 1860 that a general law for the incorporation of such cities was adopted in Iowa. This law did not apply, in Iowa, however, to cities organized under special charters, unless adopted by them.

Burke vs. Jeffries, 20 Iowa, 145.

With reference to the "consent of the governed" in such corporations, Judge Dillon, Sec., 44, lays down the rule as follows:

> "The rule which applies to private corporations, that the incorporating act is ineffectual to constitute a corporate body until it is *assented to or accepted by the corporators, has no application to statutes creating municipal corporations.* These are laws and as such are imperative and binding according to their terms without any consent, unless the act is expressly made conditional. All who live within the limits of the incorporated district are bound by them, and can withdraw from their operation only by removal. Over such corporations the legislature,

If the state acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked.

This is the general rule, and it is recognized in Texas: 'If a municipality has been illegally constituted, the state alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter.' Graham vs. City of Greenville, 67 Texas, 62."

Applying this proposition to the city of Des Moines, it is obvious that the city could not have assailed the contract which it made with the Des Moines Brick Manufacturing Company for the paving in question upon the ground that there was a defect in the organization of the city.

We call especial attention to the case of Graham vs. City of Greenville, 67 Texas, 62, which is cited by this court, with approval, in the San Angelo case, and which this court says states the general rule. This was a case where Graham contended that certain property owned by him was not liable to taxation, because the territory embracing it had not been legally annexed to the city. It was held that in a suit of this character, no collateral attack could be made upon the municipal corporation, and that it could be questioned only by an action in the name of the state. In the opinion, the courts says:

> "If a municipality has been illegally constituted, the state alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter. 'Where the question whether a corporation exists or not arises collaterally,' says Mr. Cooley, 'The courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the state as such;' and this, though the manner of incorporation prescribed by the constitution had not been followed. Cooley Constitution Lim. 311.

Mendota v. Thompson, 20 Ill., 200.
Kettering v. Jacksonville, 50 Ill., 39.
Bird v. Perkins, 38 Mich., 28.

Mr. Dillon, in his work on Municipal Corporations, thus states the law:

"In proceedings to enforce ordinances, the illegality of the corporate organization cannot be shown to defeat a recovery. In such a collateral proceeding, evidence that the corporation is acting as such is all that is required."

In the Town of Decorah vs. Gillis & Espy, 10 Iowa, 284, on a prosecution for violating one of the town ordinances, certain illegalities in the town organization were set up as a defense. With reference to this matter the court says:

"And a further thought is, that defendants cannot raise the question here made in this collateral proceeding. It might as well be claimed that the plat of the village had not been properly acknowledge or recorded; that there was fraud in the proceedings leading to the town organization, or in the passage of the ordinance in question. If the town exists as a corporation de facto, the regularity of its incorporation cannot be inquired into, in this collateral manner."

In Beach on public corporation, section 55, the rule is stated as follows:

"The state, being the creator of municipal corporations, is the proper party to impeach the validity of their creation; and consequently where the corporation is acting under color of law and is recognized by the state as so acting, its corporate existence cannot be collaterally attacked."

In Cooley's Constitutional Limitations, 6th edition, pages 309 and 310, the author says, referring to the validity of municipal organizations:

"These questions are generally questions between the incorporators and the city with which private individuals are supposed to have no concern. In proceedings where the question whether the corporation exists or not arises collaterally the courts will not permit its corporate character to be questioned, if it appear to be act-

ing under color of law and recognized by the state as such. Such a question should be raised by the state itself by quo warranto or other direct proceeding. And the rule, we apprehend, would be no different, if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state; and private parties could not enter upon any question of regularity. And the state itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition.

In the Circuit Court of Appeals for the Eighth Circuit, in a suit involving the validity of municipal bonds, the same doctrine has been announced. See

National Life Ins. Co. vs. Board of Education, 62 Fed. Rep. 778,

From which we quote:

"When a muicipal body has assumed, under color of authority, and exercised for any considerable period of time with the consent of the state, the powers of a public corporation of a kind recognized by the organic law, *neither the corporation nor any private party* can in private litigation question the legality of its existence."

In Ashley v. Board of Supervisors, 60 Fed. Rep., 55, which is another case involving the validity of municipal bonds, the authorities upon this question are reviewed and the rule adduced from them is stated by the court as follows:

"But it is needless to multiply authorities. They are substantially, if not altogether, agreed upon the proposition that when a muicipal body has assumed, under color of authority, and exercised for any considerable period of time, with the consent of the state, the powers of a public corporation of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence."

The case at bar comes directly within this rule. This

is held in the case of the State ex rel. West v. City of Des Moines, that the city had been acting under color of authority and with the acquiescence of the state for a period so long as to create an estoppel against the state.

A recent case in Indiana is:

Powell vs. City of Greensburg, 49 N. E., Rep. 955.
Decided March 29, 1898.

The same proposition is involved. In that case it was held that a property owner, in proceedings to open a street, could not question the authority of the city by collaterally attacking the validity of the annexation of the territory through which the street was to extend.

Another case is

Clement vs. Everest, 29 Mich., 19-22,

From which we make the following extract:

"It would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies; and both law and policy require that they shall not be disturbed except by some direct process authorized by law, and then only for very grave reasons.

* * * * *

In such matters as concern the public, and do not interfere with private property or liberty, such action as creates municipal bodies and gives them corporate existence cannot be questioned without creating serious disturbance. If the regularity of their organization can be kept open to question indefinitely, no one could ever be sure that any of the taxes or other matters concerning his own town were valid, and the whole public business might be blocked by litigation."

The following cases sustain this proposition:

Town of Geneva v. Cole, 61 Ill., 397.
Tisdale v. Town of Minonk, 46 Ill., 9.

be held bound by a decree in their favor to the same extent they would be bound by a decree in her favor. We think these conclusions fairly deducible from the following authorities and cases referred to therein: Ewing vs. State, 81 Tex., 172, 16 S. W. Rep. 872; 1 Freem. Judgm. Sec. 178,170,157. That the trial in the first suit was upon the merits, and embraced the whole subject-matter of this litigation, in the sense of rendering the decree an effective adjudication as distinguished from a dismissal upon formal grounds, we entertain no doubt."

This case emphasizes the proposition that not every private individual can, in a private suit, attack the validity of a municipal organization. It certainly cannot be claimed that where the state, which is the proper party to institute such a proceeding, is concluded, the preceeding may be maintained by a private individual.

In conclusion, we therefore submit that the complainants' bill was properly dismissed by the court below, because this is not a suit arising under the Constitution of the United States and because the controversy, in its nature, is one solely cognizable at law which cannot be the subject of a private suit.

N. T. GUERNSEY,

Solicitor for Des Moines Brick Manufactoring Company, Appellee.

Of Counsel
H. T. GRANGER,
ARTHUR C. GRAVES.

McCAIN *v.* DES MOINES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 238. Submitted April 5, 1899. — Decided May 1, 1899.

It appearing on the face of the bill in this case that all the parties to this suit are citizens of Iowa, and the court being of opinion that the allegation in the bill that this is a controversy and a suit of a civil nature arising under the Constitution and laws of the United States is not only not supported by the facts appearing in the bill, but is so palpably unfounded

Statement of the Case.

that it constitutes not even a color for the jurisdiction of the Circuit Court, the decree below, dismissing the bill for want of jurisdiction, is affirmed.

THE bill in this case is filed against the city of Des Moines, its board of public works, the Des Moines Brick Manufacturing Company, and the incorporated town of Greenwood Park, to obtain an injunction restraining, among other things, the city of Des Moines and its officers and agents from exercising over the territory of the incorporated town of Greenwood Park any function of municipal government for the purpose of taxation or for works of internal improvements or otherwise, and for other relief.

The bill makes the following allegations: The complainants own in severalty lands within the incorporated town of Greenwood Park, and the lands so owned by each of the complainants are worth more than $2000; adjoining the town is the city of Des Moines, a municipal corporation created under the laws of the State of Iowa. In 1890 the legislature passed an act purporting to extend the limits of the city of Des Moines so as to include therein the town above named. The constitution of the State prohibits the passing of special acts for the incorporation of cities; the act of 1890 was a special act incorporating a city and therefore prohibited by the constitution, and as a consequence entirely void. The incorporated town has never been dissolved and is entitled to exercise all the functions of government and taxation, but it has ceased to exercise them over the territory; that notwithstanding the act of 1890 is wholly void and of no effect, the defendant, the city of Des Moines, pretended and undertook to exercise the functions of government and the power of taxation over the territory of Greenwood Park; that the only warrant for the city to act in the premises is the void act of the legislature of 1890, and the city is assuming to levy assessments and to exercise the power of taxation and to perform all the other functions of municipal government under that act; that the suit herein is one of a civil nature arising under the laws and Constitution of the United States; and the sum in controversy

exceeds $2000. It appears on the face of the bill that all the parties are citizens of the State of Iowa.

The bill further alleges that the city made a contract with the defendant, the Des Moines Brick Manufacturing Company, to pave a public highway in the town, the expense of which was to be assessed upon the property abutting thereon, including the lands of the complainants, and the work was all done under color of the act mentioned, and that it was all illegal for want of authority; that at the time of the passage of the act and the taking of jurisdiction by the city, the town was exclusively an agricultural community, and there was no advantage in or necessity for the annexation of the town to the city of Des Moines, and none of the land in the town had been plotted into lots by laying out streets or alleys therein, and the highways within it were under the control and jurisdiction of the officers of Polk County, and that to subject the lands of complainants or the other lands within the town to the taxes and assessments threatened by the city of Des Moines is to take their property under color of authority from the void act of 1890, and contrary to the amendment of the Constitution of the United States, section 1, article 14.

Further allegations were made, not material to be stated.

In addition to asking for an injunction to restrain the city of Des Moines from exercising jurisdiction over the town of Greenwood Park, the complainants ask that the town "be enjoined to exercise for its own future benefit under the statutes of Iowa all functions of municipal government and taxation and works of internal improvement in the same manner and to the same extent as the said functions have been exercised by said defendant prior to March 3, 1890." The bill further prayed that the city and the board of public works should be enjoined from making any levy upon the property of the complainants to pay the expense of paving the highway, and that the city be restrained from issuing to the Des Moines Brick Manufacturing Company any assessment certificates on account of paving, and for other relief.

The defendant, the Des Moines Brick Manufacturing

Company, demurred to the bill on the ground, among others, that it appeared on the face of complainants' bill that all the parties to the suit were citizens of the State of Iowa, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore the Circuit Court had no jurisdiction in the case.

The Circuit Court sustained the demurrer on the ground of want of jurisdiction, and pursuant to section 5 of the act of March 3, 1891, organizing the Circuit Courts of Appeals, 26 Stat. 826, it has certified the question of jurisdiction alone for decision by this court.

The opinion of the District Judge, in dismissing the bill, is reported in 84 Fed. Rep. 726.

Mr. William E. Mason and *Mr. William G. Clark* for appellants.

Mr. N. T. Guernsey, *Mr. H. T. Granger* and *Mr. Arthur C. Graves* for appellee.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

The jurisdiction of the Circuit Court depends upon the act approved August 13, 1888, 25 Stat. 433, a part of which reads as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States. . . ."

As it appears upon the face of the bill that all the parties are citizens of Iowa, the Circuit Court had no jurisdiction on the ground of diverse citizenship.

Is the suit one arising under the Constitution or laws of the United States? As was said in the court below, the material question is whether the exercise of jurisdiction by the city of Des Moines over the territory purporting to be annexed by the act of 1890 is lawful? To answer that question it is

necessary only to refer to the constitution and law of the State of Iowa.

The Supreme Court of the State decided in *Iowa* v. *Des Moines*, 96 Iowa, 521, that the act of 1890 was void because it violated the constitutional provision in regard to special legislation. That was an action of *quo warranto* brought to test the right of the defendant city to exercise corporate authority over the added territory under the act of 1890. From the report of the facts in that case it appears that the city was by that act extended two and a half miles in each direction from its then present boundary, and it was provided by the same act that the corporate character of any annexed territory within the extended boundaries should cease and determine upon the passage of the act. Other sections of the act provided for the payment of the indebtedness of the city so enlarged and of the indebtedness of the cities within the annexed territory, and for the exemption from taxation for any city purpose of lands included within the extended limits which had not been laid off into lots of ten acres or less, or which should not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys or otherwise, and also of lands occupied and used in good faith for agricultural or horticultural purposes; for the reorganization of the wards of the cities and for elections therein. It appeared from the census of 1885 that only the city of Des Moines was affected by the act of 1890, and that in the added territory were one city and seven incorporated towns. The provisions of the act by which the municipal governments, other than the city of Des Moines, were to become extinct, and the entire territory to become one corporation and municipality were observed, so that in April, 1890, the change was complete, since which time the city of Des Moines has been thus constituted and has exercised throughout the territory the rights and functions of a city government, including the levy and collection of taxes, establishing, opening, vacating, changing and improving streets, the making of contracts and the creating and payment of debts.

These details, while appearing in the report in 96 Iowa, are

not set up in the complainants' bill, but their substance is shown in the allegations therein made, that the town has ceased to exercise all the functions of government and taxation, and the city of Des Moines and the board of public works are themselves exercising the functions of government over the town territory.

After the court in the *quo warranto* case had determined that the act was local legislation, and of that class prohibited by the Constitution, and therefore void, the opinion therein continues as follows:

"It is next to be determined whether or not, with the law giving rise to the annexation absolutely void, the legality of the present city organization can be sustained under the rule of estoppel or laches. On this branch of the case a large number of authorities have been cited, and the newness of the question, as well as the great interests involved, make it one of great importance. The foundation for the application of the doctrine of estoppel is the consequence to result from a judgment denying to the city of Des Moines municipal authority over the territory annexed, after the lapse of four years, during which time such authority has been exercised, and the changed conditions involving extensive public and private interests. It will be remembered that the act of annexation resulted in the abandonment of eight municipal governments, which before the annexation were independent, and bringing them under the single government of the city of Des Moines. This involved a vacation of all offices in the city and towns annexed, and the delivery of all public records and property to the officers chosen for the city so enlarged. For four years taxes have been levied, collected and expended under the new conditions; public improvements have been made, including some miles of street curbing, paving and sewerage, for which certificates and warrants have been issued, and contracts are now outstanding for such improvements. In brief, with the statement that for the four years the entire machinery of city government has been in operation, the situation may be better imagined than expressed. It is hardly possible to contemplate the situation to result from

a judgment dissolving the present city organization, and leaving the territory formerly embraced within corporate lines as it would be left. Of all the cases to which we are cited, involving the validity of municipal organizations, where the consequences to result from a judgment of avoidance are considered, not one presents a case of such uncertainty, nor where there are the same grounds for serious apprehension, because of difficulties in adjusting rights in this case."

The court then cited several cases in which the doctrine of laches had been applied to sustain a municipal government where the organization, as attempted, was illegal. See *State* v. *Leatherman*, 38 Arkansas, 81; *Jameson* v. *People*, 16 Illinois, 257; *People* v. *Maynard*, 15 Michigan, 463; and also the following from Cooley on Constitutional Limitations, (page 312, 4th ed.):

"In proceedings where the question of whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the State as such. . . . And the rule, we apprehend, would be no different, if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the State, and private parties could not enter any question of regularity. And the State itself may justly be precluded, on principles of estoppel, from raising any such objection, where there has been long acquiescence and recognition."

Continuing with its own opinion, the court stated:

"This, it is true, is a direct proceeding by the State. And, while the language used is applied in part to collateral proceedings, it seems also to include actions by the State directly. The learned writer sustains this text by a reference to *People* v. *Maynard*, (*supra*,) *Rumsey* v. *People*, 19 N. Y. 41, and *Lanning* v. *Carpenter*, 20 N. Y. 447. It will be seen that importance is given to the fact that the defective organization takes place under color of law. Nothing less can be said of the annexation in this case than that it was made under color

of law. 'Color of law' does not mean actual law. 'Color,' as a modifier, in legal parlance, means 'appearance as distinguished from reality.' Color of law means 'mere semblance of legal right.' Kin. Law Dict. & Gloss. In some of the cases the defects as to organization have been spoken of as irregularities, because of which appellant thinks the cases not applicable, because this is a void proceeding. The term 'irregularity' is oftener applied to forms or rules of procedure in practice than to a non-observance of the law in other ways, but it has application to both. It is defined as a 'violation or non-observance of established rules and practices.' The annexation in question was a legal right under the law, independent of the act held void. It was not a void thing, as if prohibited by law. The most that can be said is that the proceeding for annexation was not the one prescribed, but it was a violation or non-observance of that rule or law. It seems to us that the proceeding is no less an irregularity than in the cases cited."

And again on page 536, in speaking of the invalidity of the act of 1890, the court said:

"Had the act never been passed, and the same method for annexation been adopted, with the same conditions as to recognition, acquiescence, delays and public and private interests involved, the same conclusion would result; and hence the act is without the least significance, nor have we given it a shadow of bearing, except in so far as it may have served as a color of law inducing the proceedings for annexation."

And lastly, in speaking of the consequences to be apprehended from a judgment of ouster, the learned court said (p. 538):

"Such a judgment would disrupt the present peaceful and satisfactory arrangement of all the people of the city, as to its corporate existence, without a benefit, so far as we know, to any person. The law does not demand such a sacrifice for merely technical reasons. In fact, the constitutional vindication is complete with the declaration that the act is absolutely void."

It will thus be seen that while the Supreme Court of Iowa decided that the act purporting to extend the limits of the city was void as being in violation of the constitutional pro-

vision in regard to special and local legislation, yet the court also held, for the reasons stated, that it was sufficient in itself to constitute, under the circumstances mentioned, a color of law for the annexation, and for the application of the principles of estoppel as above mentioned. The legality of the present city organization was for those reasons sustained. It is this same organization that the complainants now ask to have enjoined in this suit from exercising any function of government in the annexed district, and the former organization in the annexed district which the complainants allege has ceased to exercise those functions, they now ask the court in this suit to enjoin it "to exercise for its own future benefits under the statutes of Iowa."

To grant the relief demanded would quite effectually overrule the decision of the state court upon a question relating purely to the local law of the State.

The claim of the complainants is based solely and wholly upon the allegation that the act of 1890 was void as in violation of the constitution of Iowa. Their counsel lay that down in so many words in their brief. They say that their claim is "that under a law declared to be void and unconstitutional by the Supreme Court of the State of Iowa, the city of Des Moines is still exercising municipal control and jurisdiction over the complainants' property." There is an allegation in the bill that the land of the town was agricultural, but it is not asserted that the act was a violation of the Federal Constitution because it included such lands. No such question is made by the bill.

In their brief counsel urge that the act was void because among other things it was a violation of the constitution of Iowa in bringing agricultural lands, under the circumstances and to the extent mentioned, into the control and limits of the city. The act itself in the third section exempts such lands from taxation for any city purpose, when they shall in good faith be occupied and used for agricultural or horticultural purposes.

It is therefore quite plain that the complainants base their case upon the allegation that their property is about to be

taken from them by the city authorities without due process of law and in violation of the Constitution of the United States, because the act of 1890 violates the constitution of Iowa. That is a question of law, depending for its solution upon the law of Iowa, and as to what that law is the Federal courts are bound in such a case as this by the decision of the state tribunal. There is no construction of the Federal Constitution involved in that inquiry, nor any question as to its effect upon the complainants' rights in this suit. The question whether their property is taken without due process of law must be decided with sole reference to the law of Iowa. How can it be said upon such facts that any question arises under the Constitution or laws of the United States? The claim of the complainants will not be defeated by one construction of that clause in the Constitution or sanctioned by the other. *Starin* v. *New York*, 115 U. S. 248. There is no dispute about construction in any way whatever; the only question is as to the validity of the city organization, which, as stated, is a matter of state law.

The case is, however, made still stronger by the fact that the validity of the present organization of the city government and the lawfulness of its exercise of jurisdiction over the territory mentioned has been already decided by the state court, and had been so decided when this suit was commenced. It is not important upon what ground the state court proceeded in arriving at its judgment, whether it was because the act of 1890 was valid, or that being invalid, the lawfulness of the organization could not be inquired into for the reasons stated in the opinion of the court above quoted. The complainants however argue that the state Supreme Court in the *quo warranto* case did not decide upon the validity of the city organization, but only that the relator, being a non-resident of the city and paying taxes in the town in the nominal sum of a dollar a year, would not be heard upon a question which might disturb the peaceful relations that existed in the territory, and which might also overturn the municipal authority of the city of Des Moines therein. Counsel allege that these complainants do not attempt to test the corporate existence

of the city of Des Moines, but simply to test the right of that corporation to levy taxes for certain purposes upon the property of the complainants.

The last assertion, so far as concerns the testing of the corporate existence of the city in the territory mentioned, is clearly an error, because the bill asks relief in the way of a perpetual injunction to restrain the city of Des Moines, its officers and agents, from the exercise of any function of municipal government or authority or jurisdiction for the purpose of taxation or for works of internal improvement in the town of Greenwood Park, and it asks that the city officers be perpetually restrained from interfering with the officers of the town or from obstructing them in the administration of the municipal affairs of the town; and that the town "be authorized and enjoined to exercise for its own future benefits under the statutes of the State of Iowa all functions of municipal government, taxation and works of internal improvement, in the same manner and to the same extent as the said functions have been exercised by defendant prior to the 3d day of March, 1890." This prayer for relief seeks to test pretty substantially the corporate existence of the city of Des Moines in the territory in question. It does, of course, also seek to test the right of the corporation to levy taxes for the purposes named in the bill and upon the property of the complainants; but the right to levy these taxes depends entirely upon the legality of the city organization, so that if the organization is not lawful, the taxation is equally invalid.

The commencement of this suit is plainly an attempt to overturn the decision of the state court in the *quo warranto* case. In our opinion the complainants take much too narrow a view of the decision of the state court in that case. The facts of the non-residence of the relator and the smallness of his interest were spoken of, but they formed only an insignificant part of other and more important facts upon which the reasoning of the court was based. Those other facts were of a public nature, and the court, in its opinion, gave great weight to the public interests that were involved and the great injury that would fall upon all public as well as private

interests by overturning an authority that had lasted four years, and which had been initiated under color and by reason of an act of the legislature. The court in truth decided that the legality of the city organization could not be inquired into, even in a direct proceeding brought by the State to test the validity of the act, or, in other words, the validity must be sustained for the following, among other, stated reasons: The lapse of time; the actions of the authorities of both city and town in taking and yielding possession and jurisdiction; the delivery of all public records and the closing of all public offices by the officers in all the abandoned municipal governments; the levying, collection and expenditure of taxes; the public improvements made after the passage of the act; the bonds that had been recalled by the city and others issued in their place; the general recognition of the validity of the municipal government by all classes of the community; the color of law under which the organization of the city government had been practically effected in the territory; and the inextricable confusion into which the whole affairs of the city and town would be thrown as the necessary result of holding that the city government did not extend over the territory mentioned. For these public considerations the court refused to permit the inquiry to be made, even by the State, into the validity of the municipal government of the city as enlarged under color of the act of 1890. That no collateral inquiry would be permitted the opinion takes as unquestionably plain.

For the purpose probably of meeting the argument arising from acquiescence, as set forth in the *quo warranto* case, the complainants allege in the bill herein that they and the citizens of Greenwood Park have not assented to or acquiesced in or agreed to the acts of the city of Des Moines, and that jurisdiction has been exercised over them without their consent, and without permitting the citizens by election or otherwise to determine whether the pretended acts of annexation should be operative or not. These allegations would seem to refer to the state of mind which the complainants and citizens were in during these many years, and the allegation of an absence of

acquiescence would also seem to have been founded upon the fact that there had been no election by which to determine whether the act should be accepted or not. Neither fact alters the effect to be properly given the opinion in the case mentioned, in the face of the facts actually existing. From the time of the passage of the annexation act up to the commencement of this suit, a period of seven years, there is no allegation of any act on the part of the complainants or any other citizen in the way of an attempt to test the validity of this legislation with the exception of the suit brought by the State upon the relation of a non-resident property owner who paid taxes in the amount of one dollar a year. Otherwise than as above stated there is no allegation tending to show dissatisfaction with the legislation prior to September, 1897, when the brick company defendant entered upon the work which led to the assessment in dispute in this suit. During these years the city authorities have, as the bill alleges, performed all the functions of government in the territory, and taxes have been imposed and collected (presumably from complainants among others), improvements commenced and continued, interest on bonds paid, and no action taken by any one to prevent these measures or to test their validity. What may have been the secret thoughts of the complainants or other citizens during all this time must be matter wholly immaterial, so long as there was such acquiescence on the part of the public authorities as has been stated in the opinion of the court in the *quo warranto* case, and such as substantially appears by the allegations of the bill in this suit. The particular allegations of non-acquiescence by the complainants do not detract from the strength of the principles laid down by the state court, nor do they in any degree affect the full applicability of those principles to the facts set up in the bill in this suit. The action of the State against the city of Des Moines has been the only thing done towards making any attempt to test the question of the validity of the legislation prior to the commencement of this suit. In this suit we are bound to take the law of Iowa as it has been decided to be in the *quo warranto* case. In that case it has been deliberately decided that the validity of the organi-

zation of the municipal government in the whole territory in which it has been in practical operation for so long a time cannot be the subject of judicial inquiry by any one at this late day. Such being the law of Iowa, we are of opinion that an allegation in the bill that this is a controversy and a suit of a civil nature arising under the Constitution and laws of the United States, is not supported by the facts appearing in the bill. The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution or of some law of the United States, upon the determination of which the recovery depends. *Shreveport* v. *Cole*, 129 U. S. 36; *New Orleans* v. *Benjamin*, 153 U. S. 411.

Taking the law of Iowa to be as decided in the case mentioned, it appears that the validity of the city government has been sustained by the state court, and in that event there is not a shadow of a Federal question in this suit, for if the city government be valid, the regularity and validity of the proposed assessment necessarily follow, and there cannot be even a pretence that the collection of the assessment would be without due process of law.

The allegation that the suit arises under the Constitution of the United States is so palpably unfounded that it constitutes not even a color for the jurisdiction of the Circuit Court. That court was therefore right in dismissing the bill, and its decree must be

Affirmed.